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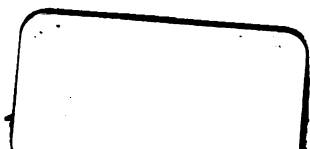
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NOTES OF CASES

IN THE

ECCLESIASTICAL & MARITIME COURTS,

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VOLUME VII.



EASTER TERM 1849 TO EASTER TERM 1850.

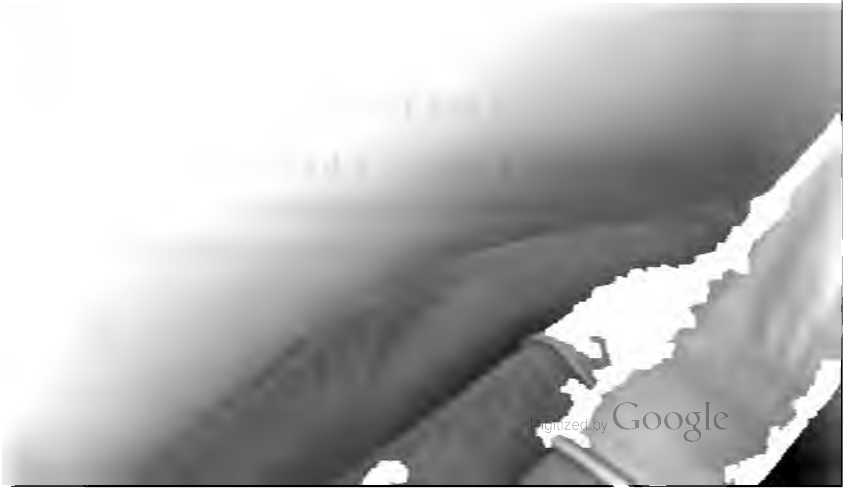
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PREFACE.

THESE Notes having now extended to seven volumes, it is considered expedient that the work should be brought to a close.

For the facilities which have been afforded to him by every part of the Profession, during the nine years of its existence, the Editor begs to offer his best thanks.

This final volume, besides a copious collection of the latest constructions of section 9 of the Wills Act,* comprehends the entire series of decisions upon the various points which arose in the progress of the important case of *Gorham, clerk, v. the Bishop of Exeter*, including the judgments in the Courts of Law on Motions for a Prohibition.

THOMAS THORNTON.

30th October, 1850.

* A forcible exposition of the effects of this part of the Statute, as construed by the Courts, has recently appeared in a pamphlet, entitled, "Practical Remarks upon the injurious operation of the Wills Act, in respect to the execution of Wills; with suggestions for its amendment; by an Advocate in Doctors' Commons."

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LIST OF APPEALS

Heard and determined by the JUDICIAL COMMITTEE of the PRIVY COUNCIL from the COURTS of the two PROVINCES of CANTERBURY and YORK, and from the HIGH COURT of ADMIRALTY of ENGLAND, from the year 1834 to the year 1850.

Date.	Name of Case.	Courts whence appealed.	Result.
1836.			
June 6	Greetham v. Taylor	Prerogative of York	Affirmed.
— —	Naylor v. Fox	The same	Reversed.
— 21	Tongue v. Tongue.....	Arches of Canterbury ...	Affirmed.
— —	Kilpin v. Kilpin.....	The same	Affirmed.
— 22	Smyth v. Smyth.....	The same	Reversed.
July 2	{ Heathorne v. Darling } (the <i>Eliza</i>)	Admiralty	Reversed.
Dec. 6	Crawford v. Curran	Prerogative of Canterbury	Affirmed.
— 8	Thompson v. Poirrett.....	The same	Affirmed.
— 17	Scott v. Scott.....	The same	Affirmed.
— —	Welch v. Phillips	The same	Reversed.
1837.			
July 5	Nunn v. Clarke	The same	Affirmed.
— —	Robinson v. Read	Admiralty	Affirmed.
Dec. 6	Sherwood v. Ray	Arches of Canterbury ...	Affirmed.
1838.			
Feb. 5	Armstrong v. Huddleston	Prerogative of Canterbury	{ Affirmed, except as to costs.
— —	Castle v. Torre	The same	Affirmed.
— 10	Stewart v. Harrison	The same	Affirmed.
— —	Hoyle v. Hasted	The same	Affirmed.
June 18	Baker v. Butt.....	The same	Affirmed.
— —	Hamlin v. Hamlin.....	Arches of Canterbury ...	Affirmed.
— —	Marsh v. Marshall.....	Admiralty	Affirmed.
— 19	Scrivener v. Scrivener ...	Arches of Canterbury ...	Affirmed.
— 26	Hitchings v. Wood	Prerogative of Canterbury	Reversed.
— 30	Farlar v. Chesterton	Arches of Canterbury ...	Reversed.
— —	Tatnall v. Hankey.....	Prerogative of Canterbury	Affirmed.
July 2	Stephenson v. Fewson ..	Admiralty	Affirmed.
— 6	{ General Steam Naviga- tion Company v. Dooley }	The same	Reversed.
Dec. 12	Mellin v. Mellin.....	Consistory of York	Affirmed.
— 24	Barry v. Butlin	Prerogative of Canterbury	Affirmed.
1839.			
June 13	Goode v. Moore.....	The same	Affirmed.
1840.			
Feb. 6	{ Gore v. Gardner (the <i>Hersey</i>)	Admiralty	Affirmed.
— —	Barroby v. Barroby	Consistory of York	Reversed.
— 24	Dufaur v. Croft	Prerogative of Canterbury	Affirmed.
— —	Grant v. Grant	Arches of Canterbury ...	Affirmed.
July 2	Speer v. Burder.....	The same	Affirmed.
— 10	Bateman v. Pennington...	Prerogative of Canterbury	Reversed.
— —	Giles v. Turley	The same	Affirmed.
— 14	Collett v. Collett	Arches of Canterbury ...	Reversed.

Date.	Name of Case.	Courts whence appealed.	Result.
1841.			
Jan. 13	Goddard v. Vere	Prerogative of Canterbury	Affirmed.
— 19	Harwood v. Baker.....	The same	Affirmed.
July 1	Brooke v. Kent ¹	The same	Reversed.
Aug. 16	Wood v. Goodlake ²	The same	Reversed.
—	Helps v. Goodlake ²	The same	Reversed.
1842.			
Feb. 10	Taylor v. Taylor	Archives of Canterbury ...	Affirmed.
— 19	Deare v. Elwyn ³	Prerogative of Canterbury	Affirmed.
—	Ditchburne v. Fearne ...	The same	Affirmed.
—	{ Stuart v. Isemonger (the Diana) ⁴	Admiralty	Affirmed.
—	Henfrey v. Henfrey ⁴	Prerogative of Canterbury	Affirmed.
June 20	Smith v. Gould	Admiralty	Reversed.
— 21	Wallis v. Maughan ⁵	Prerogative of York	Reversed.
July 2	Escott v. Mastin ⁷	Archives of Canterbury ...	Affirmed.
— 9	Harrison v. Harrison ...	The same	Affirmed.
— 13	Blenkinsop v. Blenkinsop	Chancery of York	{ Allegation reformed.
Dec. 9	Head v. Sanders ⁸	Archives of Canterbury ...	Affirmed.
—	Edwards v. Fincham.....	Prerogative of Canterbury	Affirmed.
1843.			
Feb. 18	Clark v. Carter ⁹	The same	Affirmed.
July 3	{ Brownlow v. Garson (the Gazelle)	Admiralty	Affirmed.
— 8	Lee v. Egremont	Prerogative of York	Reversed.
— 10	Panton v. Williams ¹⁰	Prerogative of Canterbury	Reversed.
Nov. 27	Chambers v. Wood ¹¹	The same	Reversed.
Dec. 2	Fife v. Blunt	Archives of Canterbury ...	Affirmed.
— 4	Langley v. Burder	The same	Affirmed.
1844.			
Feb. 8	{ General Steam Naviga- tion Company v. Tonkin (the Friends)	Admiralty	Affirmed.
— 21	Hlott v. Genge	Prerogative of Canterbury	Affirmed.
May 11	Meddowcroft v. Huguenin	The same	Affirmed.
— 16	Piggott v. Bearblock ¹² ...	Archives of Canterbury ...	Reversed.
— 20	Mackenzie v. Yeo	Prerogative of Canterbury	Affirmed.
June 13	{ Croker v. Marquess of Hertford ¹³	The same	Affirmed.
— 17	Penny v. Taver	The same	Affirmed.
1845.			
Jan. 17	Jones v. Godrich ¹⁴	The same	Reversed.
Feb. 3	Cooper v. Bockett ¹⁵	The same	Affirmed.
June 14	Curtis v. Curtis	Archives of Canterbury ...	Affirmed.
—	Faulds v. Jackson ¹⁶	Prerogative of York	Affirmed.
July 25	Cockcraft v. Rawles ¹⁷ ...	Prerogative of Canterbury	Reversed.
1846.			
Feb. 4	Hampton v. Eyton ¹⁸	Archives of Canterbury ...	Affirmed.
— 14	Barnes v. Vincent ¹⁹	Prerogative of Canterbury	Reversed.

¹ 1 Notes of Ca. 93.

² *Ibid.* 144.

³ *Ibid.* 342.

⁴ *Ibid.* 357.

⁵ *Ibid.* 336.

⁶ *Ibid.* 534.

⁷ *Ibid.* 552.

⁸ 2 Notes of Ca. 364.

⁹ *Ibid.* 176.

¹⁰ *Ibid.* Supp. xxi.

¹¹ *Ibid.* 481.

¹² 3 Notes of Ca. 85.

¹³ *Ibid.* 150.

¹⁴ *Ibid.* 487.

¹⁵ 4 Notes of Ca. 586.

¹⁶ 6 Notes of Ca. Supp. i.

¹⁷ 4 Notes of Ca. 237.

¹⁸ *Ibid.* 549.

¹⁹ *Ibid.* Supp. xxi.

Date.	Name of Case.	Courts whence appealed.	Result.
1846.			
May 15	Bluck v. Rackham ²⁰	Archers of Canterbury ...	Affirmed.
— 20	{ Chilton v. Robert (the Evening Star)..... }	Admiralty	Affirmed.
June 18	{ Williams v. Chapman (the Iron Duke) ²¹	The same	Affirmed.
Dec. 3	Fowles v. Davidson ²²	Prerogative of Canterbury	Affirmed.
— 5	Barnes v. Vincent ²³	The same	Varied.
1847.			
Feb. 9	Geils v. Geils.....	Archers of Canterbury ...	Affirmed.
— 15	{ Caledonian Towing Co. v. Hutton (the Me- dora) ²⁴	Admiralty	Reversed.
— 19	{ Bernard v. Hyne (the Saracen)	The same	Affirmed.
June 29	Phillips v. Phillips ²⁵	Archers of Canterbury ...	Affirmed.
July 2	O'Shaunessy v. Casey ...	Prerogative of Canterbury	Affirmed.
— 19	{ Shersby v. Hibbert (the Duke of Manchester) ²⁶ }	Admiralty	Affirmed.
Dec. 10	Michell v. Thomas ²⁷	Prerogative of Canterbury	Affirmed.
— 17	{ Green v. Ryan (the Se- ringapatam)..... }	Admiralty	Affirmed.
1848.			
Feb. 14	Shore v. Barnes	Archers of Canterbury ...	Affirmed.
— 28	{ Harrison v. Cheesman (the George) ²⁸ }	Admiralty	Affirmed.
— —	{ Crosby v. Watson (the Endeavour)	The same	Affirmed.
June 28	{ Dyke (Queen's Proctor) v. Walford ²⁹	Chancery of York	Affirmed.
July 3	Handley v. Edwards	Prerogative of Canterbury	Affirmed.
— 4	{ Kemp v. Tindall (the Agenoria)	Admiralty	Affirmed.
— 5	{ Petley v. Catto (the Christina) ³⁰	The same	Affirmed.
— 8	Waring v. Waring ³¹	Prerogative of Canterbury	Affirmed.
— 17	Smee v. Bryer ³²	The same	Affirmed.
Dec. 11	Fennell v. Bate	The same	Affirmed.
— 19	Daniel v. Nourse	The same	Affirmed.
1849.			
Feb. 12	Browning v. Budd.....	The same	Reversed.
Mar. 20	Craig v. Farnall ³³	Archers of Canterbury ...	Reversed.
June 25	{ The Queen v. Belcher (Illanoon Pirates) ... }	Admiralty	Affirmed.
— 26	Wilson v. Wilson	Archers of Canterbury ...	Affirmed.
July 6	{ Beech v. Marquis (the Repulse)	Admiralty	Varied.
1850.			
Mar. 8	{ Gorham v. Bishop of Exeter ³⁴	Archers of Canterbury ...	Reversed.
July 4	{ Hammond v. Rogers (the Christiana) ³⁵ ... }	Admiralty	Affirmed.

²⁰ 4 Notes of Ca. 534.²⁴ *Ibid.* 156.²⁶ 6 Notes of Ca. 53.²⁸ *Ibid.* 406, Supp. xli.²¹ *Ibid.* 585.²⁵ *Ibid.* 435.²⁷ *Ibid.* 309.²⁹ *Ibid.* 682.²² 6 Notes of Ca. 469.²⁶ *Ibid.* 470.²⁸ *Ibid.* 361.³⁴ 7 Notes of Ca. 412.²³ 5 Notes of Ca. 91.²⁷ *Ibid.* 600.³¹ *Ibid.* 388.³⁵ *Ibid.* Supp. xli.

NOTES OF CASES.

EASTER TERM, 1849.

Archbishop's Court of Canterbury.

APRIL 16.

1st Sess.

THE OFFICE OF THE JUDGE PROMOTED BY THE LORD BISHOP OF LINCOLN *v.* DAY, CLERK.—*Motion*.—This was originally a proceeding against the Rev. William Day, Rector of Hawridge, Bucks, for habitual intoxication, and on the 3rd December, 1845, this Court* held the Articles to have been proved, and sentenced Mr. Day to be suspended for three years, and until he should exhibit and leave in the Registry a certificate, under the hands of three beneficed clergymen, that he had been of good behaviour during his suspension. The period of suspension expired on the 14th December, 1848, and Mr. Day resumed his clerical functions in the church without exhibiting any certificate, as required by the terms of the sentence. A Decree and Monition to show cause why he should not be pronounced in contempt for disobedience of the sentence issued, and was personally served on the 19th February upon Mr. Day, who gave no appearance.

Dr. Haggard moved the Court to pronounce Mr. Day in contempt; and the party having been thrice called, and not appearing,

* 4 Notes of Ca. 299.

APRIL 16. SIR H. JENNER FUST.

Bp. of Lincoln
v. Day.

DECEER.

I see no reason why the Court should not at once pronounce Mr. Day in contempt for disobeying the orders of the Court; and let his contempt be signified.

Fox, Proctor for the Promoter.

High Court of Admiralty.

2nd Sess.

APRIL 25.

Collision. — THE “CHRISTIANA” (BROWN).—*Cause, by Act on Petition.*—This was a cause of damage by the owners of the barque *Marshal Bennett* against the American ship *Christiana*, to recover the loss sustained by a collision between the two vessels.

A ship, with a licensed pilot on board, having been, whilst at anchor in the Downs, in a December night, the weather bad, been run into by another vessel, and made to start from her anchorage, and she drove into a vessel at anchor; — Held, that she was to blame, first, because, notwithstanding the bad weather and a large number of vessels lying wind-bound in the Downs, she neglected to send down her top-gallant and main-royal yards, also her short fore and mizen top-gal-

The Act alleged that the barque, of 350 tons, bound from London to Constantinople, with a cargo, on the 1st December, 1848, came to anchor in the Downs, the wind blowing strong, with hard squalls, from the W.; that, on the morning of the 4th, the wind blowing a strong gale from the W.S.W. and S.S.W., the best bower-cable was veered out to the end, when, about 5 A.M., the man on the look-out descried the ship *Christiana* right ahead, not more than three ship’s lengths, driving fast into the hawse of the barque, the night being dark and the ship showing no light, whereas the barque had a bright light in her cuddy; that the ship drove so fast, that it was impossible for the barque’s chain to be slipped in time to avoid her, and very soon after, she struck the *Marshal Bennett*, and caused her considerable damage; and it alleged that the collision was entirely attributable to the carelessness or want of skill of those on board the *Christiana*, who, notwithstanding the bad state of the weather, and the large number of vessels (above 100) lying wind-bound in the Downs, neglected to send down

her top-gallant and main-royal yards, but kept the same across, as also her short fore and misen top-gallant masts, although the same or similar precautions were adopted by the *Marshal Bennett* and other vessels in the Downs, whereby they were enabled to ride out the bad weather in safety; that, even after the *Christiana* was found to be driving from her anchors, no measures were taken on board of her, by exhibiting a light or otherwise, to give timely warning to other vessels, in consequence of which neglect, prior to her collision with the barque, she had come in collision with another vessel, the *Reuennais*; and that, had her stay-sail and jib been set, she would have dragged her anchor off shore and cleared the *Marshal Bennett*.

The Answer on the part of the *Christiana* (a ship of 762 tons) alleged that she was bound from London to New York, with a cargo and 140 passengers; that, on the night of the 3rd December, the wind blowing strongly from the W.S.W., she was brought up with her small bower anchor and seventy-five fathoms of chain, under the directions of George West Brown, a licensed Trinity pilot, there being about 150 vessels lying in the Downs, wind-bound; that early in the morning of the 4th, it being dark, the wind having veered to the S.S.W., a heavy squall came on, during which a strange barque drove down stern foremost upon the *Christiana*, and occasioned her to start her anchorage; that the ship's best bower anchor was then let go, under the pilot's order, and the best bower chain veered out to sixty fathoms, the ship continuing to drive, when, all at once, the barque was seen right a-stern, whereupon the pilot, considering that the veering out of more chain would be dangerous, from the close proximity of the two vessels, ordered the veering to be stopped, and that the fore topmast stay-sail should be set, the foreyards filled, and the helm put hard a-starboard (which were instantly done), in order, if possible, to sheer the ship clear of the barque, which was hailed to slack away or slip their chain; that the barque's crew paid no attention to the hailing, nor made any attempt to avoid a collision, and the ship drove down upon the barque; that at this time one only of the barque's crew

APRIL 25.

Christiana.

lant masts; and secondly, because she did not set her stay-sail and jib, and so dragging her anchor off shore:—Held, further, that, though the latter was the fault of the pilot alone, the first was a neglect not only of the pilot but of the master; and consequently the owners were not exonerated under the Statute.—The pilot, though his duty ended in the Downs, under the circumstances, would not have been justified in quitting the vessel, of which he was still in charge, so that the owners had the legal benefit of his presence.

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Christiana.

appeared on deck, and her chain was foul ; that the entire management of the *Christiana* throughout the premises was in the hands of the pilot only, and that all his orders were instantly and implicitly obeyed ; it denied that there was any occasion for her to have sent down her top-gallant and main-royal yards, and her short fore and mizen top-gallant masts, or either, at the period of her being brought up, or that her not having sent them down occasioned the collision, which was occasioned solely by the strange barque having driven into her ; it alleged that the *Christiana* had a large and brilliant lamp burning in the after-cabin, the light from which could be seen a great way off through the large windows in her stern, and there was a large bright binnacle-lamp on the higher part of her poop, visible for three miles ; it denied that she had been in collision on the night in question, save the aforesaid ; and it alleged that this collision, if not the result of accident, was imputable to the barque, but if to the *Christiana*, her owners were exempt from liability, under the Statute, by reason of the ship being in charge of a pilot, whose orders were obeyed.

The Court was assisted by two of the Elder Brethren of the Trinity House.*

Sir J. Dodson, Q.A., and *Dr. Bayford*, for the barque ;
Drs. Addams and *Twiss*, for the *Christiana*.

SUMMING UP.

DR. LUSHINGTON, addressing the Elder Brethren :

Gentlemen,—The particular circumstances upon which your ultimate opinion must be founded are these: the *Marshal Bennett*, the party suing, makes the following charges :—First, the neglect of the *Christiana* to send down the top-gallant and main-royal yards, and, instead of so doing, keeping them across ; as also her short fore and mizen top-gallant masts. The fact does not seem to be denied, but we have to consider whether the charge of neglect is well founded, and, if it is, whether the collision took place in consequence of this neglect. The second charge is, that the *Christiana* did not exhibit a light, or otherwise give

* Captain Hayman and Captain Bax.

warning of her approach. This is expressly denied, and I think it is proved that she did exhibit two lights. It is for you to determine whether that was sufficient. The third charge is, not setting the stay-sail and jib, and so dragging her anchor from the shore after the first collision. The answer to that is, that the fore-topmast stay-sail was set, the fore-yards filled, and the helm put hard a-starboard, upon descreying the *Marshal Bennett*. This again is a nautical question, for your determination. The last charge against the *Christiana* is, not slipping her anchor and going out to sea. It is not disputed that the fact was so; but it is said that it would not have been right to adopt that measure. We must consider whether these facts are true; if so, whether they carry blame with them, and whether that blame attaches to the master and crew, or to the pilot.

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The answer of the *Christiana* contains a defence of herself, and prefers a charge against the *Marshal Bennett*. In the defence, it is alleged that the *Christiana* was not driven from her anchor by any fault of her own, or even by the weather, but by another vessel having broken adrift and run against her, and she says that that vessel was not the *Revenais*. This is a question of evidence, and the importance of it is this, that, notwithstanding she was riding at a single anchor, she would have remained in perfect safety had it not been for this unfortunate accident, which compelled her to break her anchorage. The reply, on the part of the *Marshal Bennett*, is, that the *Christiana* did drive from her anchor, and ran into the *Revenais*.

Now, it is distinctly sworn, on the part of the *Christiana*, that, whilst at anchor, some vessel unknown did run into her, and make her start from her anchor, at half-past two A.M., and if the persons swearing this do not speak the truth, it would look very much as if they were deliberately perjured. This, however, was sworn before it was known what would be the case on the other side, and therefore it is entitled to greater consideration. Two persons on board the *Revenais* swear that the *Christiana* did run into them; but they make the collision to have taken place at five o'clock, and not at half-past two. As this is a question of evidence

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as much as of nautical experience, I am bound to tell you that I do not think it is made out that there was any collision between the *Christiana* and the *Reuenmais*. These two French persons may not have perjured themselves, but I am not satisfied that they are to be believed in preference to all the rest of the witnesses. I do not think it is proved that the *Christiana* drove from her anchor before the first collision. The fact, however, may turn out of very little importance. The *Christiana* says, she took all the measures which she ought to have adopted under the circumstances; that the best bower anchor was let go; that the fore top-mast stay-sail was set, the fore-yards filled, and the helm put hard a-starboard, previous to the collision. The pilot says he gave the order, and you must judge whether it was carried into execution.

The counter-charges made by the *Christiana* against the *Marshal Bennett* are, first, that her cable was foul. I think it is proved that it was not fouled. The *Christiana* says, the *Marshal Bennett* ought to have alipped from her anchor; she denies this, and says that it would have torn out the hawse timber, and done other mischief. This is a point for your consideration. The next averment is, that the *Marshal Bennett* had not a good look-out; and you will say whether you think that two persons were sufficient for the anchor-watch. I see no reason to impute the slightest dereliction of duty in that respect. It is then said that the *Marshal Bennett* had no visible light. She had a light such as she describes; but whether she ought to have had one of a different character, is for you to determine. The ordinary rule unquestionably is, that vessels need not carry a light; but there are exceptions when a vessel is at anchor.

Effect of a
pilot being on
board the ves-
sel.

Here arises another question of great importance, not merely to the parties, but to the interests of navigation. It is said, on behalf of the *Christiana*, that she had a pilot on board; that, whether right or wrong, she did everything he directed, and therefore, under the Act of Parliament, her owners are exempted from all responsibility. This opens up several considerations. We know generally that a pilot has the whole conduct of a ship; that, under all ordinary cir-

circumstances, his orders are to be obeyed implicitly by those under his command, and that, even if the measures are wrong, the owners are exonerated from all responsibility. The reason is manifest. Why is a pilot to conduct a vessel, except on the supposition that he has more local knowledge than the master and crew? But I never can think that a master is to divest himself of all discretion, and abandon his vessel to the ability of a pilot. The first case of that kind which occurred here was that of the "*Diana*,"* where the pilot, the master, and the mate, went below, and I held that all parties were to blame. The case was carried to the Judicial Committee, and they upheld my decision.† Looking at all the circumstances in this case, you will have to consider whether anything was omitted to be done which was not only the duty of the pilot, but also of the master. It has been argued that we have nothing to do with the pilot; that when he arrived in the Downs, his work was done; that he was a mere supernumerary on board, and the owners cannot avail themselves of the Pilot Act, which says that no pilot shall be at liberty to quit the vessel until the service he has undertaken has been performed. You will have to consider whether, looking at the state of the weather, the pilot would have been justified in quitting this vessel. If so, it is clear that his duty would have been at an end. This is a very important case, and I shall request you to retire with me, to see if we can satisfactorily determine it.

(After consultation.)

PER CURIAM.

JUDGMENT.

The gentlemen by whom I am assisted have taken into consideration all those points which were deemed material.

With respect to the first charge preferred by the *Marshal Bennett*,—that of neglecting to send down the top-gallant and main-royal yards,—they are of opinion that this was a fault and a neglect not only in the pilot, but in the master;

* 1 Rob. jun. 131.

† *Stuart v. Isomonger*, 4 Moo. P. C. C. 11.

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that it was the duty of the latter to have interfered, and to have resorted to proper measures for the safety of his ship. The exhibition of a light was disposed of before. They are of opinion that there was an omission in not setting the stay-sail and jib, and so dragging the anchor from the shore ; but that belongs to the pilot alone. They think that the *Christiana* was justified in not slipping from her anchor and going to sea.

With respect to the charges against the *Marshal Bennett*, they are of opinion that the cable was not foul, and that it was not right, necessary, or expedient, to cut it or slip from it ; but at the same time, it was not in the condition that it ought to have been, to be easily slipped from. They are of opinion that the pilot was in charge of the *Christiana*, and that, under the circumstances, he would not have been justified in quitting the vessel. The owners, therefore, are entitled to all the benefit that can accrue to them from his being on board.

Damage pro-
nounced for.

It only remains for me to state the conclusion, which is, that the *Christiana* was to blame, and that there was negligence on the part both of the master and the pilot. The master being to blame, according to the case of the "*Diana*," the owners are not protected by virtue of the Act. I therefore must pronounce against the case of the *Christiana* ; and, with regard to the *Marshal Bennett*, as the Trinity Masters are of opinion that there is nothing in her conduct deserving blame, the owners are entitled to succeed in their case.

As to the fact of the *Christiana* having been driven from her anchorage by another vessel, I submitted that point to the Trinity Masters, who were strongly of opinion that she might have been brought up, notwithstanding she had been run into, if they had taken down the top-gallant and main-royal yards.

Proctors :—*Rothery*, for the barque ; *F. Clarkson*, for the American ship.

Consistory Court of London.

MAY 1.

2nd Sess.

CATON v. CATON.—*Cause.*—This was a suit for a divorce by reason of adultery, promoted by Mr. Richard Redmond Caton against Anna Maria Caton, his wife. The Libel pleaded as follows :—

Divorce by reason of adultery by the husband against the wife, sustained.—Form of pleading and sufficiency of legal evidence, considered.

1—3. The marriage of the parties on the 23rd June, 1831; cohabitation until December, 1843, and the birth of children. 4. That, at the time of the marriage, Mr. Caton was assistant-surgeon in the Grenadier Guards, but in about six months after he retired from the army, and with his wife went to reside with her parents at Woodmancote, in Sussex, until the death of Mr. Rideout, the father of Mrs. Caton, in 1838, when they went, with her mother, to Brighton, where they resided together until June, 1841. 5. That, whilst residing at Brighton, they had a large circle of acquaintance, and amongst their visitors were the officers of the regiment quartered there; that early in March, 1841, a change was observed in the manner and conduct of Mrs. Caton towards her husband and children; she became unkind to him and negligent of them, and that, about this time, unknown to Mr. Caton, she formed an attachment to, and carried on an adulterous intercourse with, B. H., a cornet in the 11th regiment of Hussars, then stationed at Brighton, who, with other officers of the regiment, was in the habit of visiting at the house. 6. That Mr. Caton, having had reason to suspect that his wife had written a letter to B. H., went to the post-office, and found the letter had been put in there, whereupon he informed Messrs. Rideout, two brothers of Mrs. Caton (then on a visit to Mrs. Rideout, their mother), who went to the barracks and demanded the letter from B. H., who gave them an order (the letter not having reached him) to the sergeant who was returning from the post-office with the letter-bag, to deliver the letter, which they obtained, so that it was never received by B. H. 7. That Messrs. Rideout refused to deliver the letter to Mr. Caton, or to permit him to see it, and he was ignorant of the contents until after the final separation, they having assured him, on their honour, that there was nothing in the letter to criminate his wife, who had been guilty of indiscretion only, and Mrs. Caton having, upon her knees, before her

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mother and children, solemnly protested her innocence, Mr. Caton, at their solicitations, for the sake of her children, consented to reside with her. 8. Exhibits the letter, which is to the following effect :—" My dearest Broadley, My dreadful tyrant will not let me see you alone—he suspects our attachment, but knows nothing ; he does not even know that I have ever written to you, except the verses, which he found out by some means or other. He has dismissed my maid, as he thought I have conversations with her about you. We have had such scenes since he returned. I am so ill-used and so miserable. He knocked me down, almost tore my arm from the shoulder, and all but strangled me in his rage ; they locked me up, and watch me in every possible manner. Pity me, Darling, for having to live with such a Brute. I dare not write to you again, and do not you write to me, or we shall be found out. I wrote this by stealth in my dressing-room ; I am so anxious for you to know how matters stand. Pray, if you see me in the street, come and shake hands with me. You know my love for you, which never shall change. Pity me and love me. Heaven bless you, Dearest Broadley, ever believe me most affectly yours, A. M." 9. That Mrs. Caton had subsequently confessed to Mad. Mary Ann St. Rose, wife of Major Edmond St. Rose, that she loved B. H. more than her husband, and that, in the absence of the latter from home, she used to let B. H. into the house at Brighton at night, by leaving the door open. 10. That, soon after their reconciliation, Mrs. Caton began to quarrel with her husband, and her conduct became so disagreeable, that he left her with her mother, and went himself with his children to reside in lodgings at Henfield, Sussex, in June, 1841, but in about a fortnight, at the entreaty of his wife and her family, for the sake of the children, he was induced to return to cohabitation, and in July, 1841, they went to reside, with Mrs. Rideout, at Tunbridge Wells, where they remained until August, 1843, when, for the sake of educating his children, Mr. Caton went with his wife and family to reside at Paris. 11. That in August, 1843, Mr. Caton engaged a suite of apartments, in Paris, in the house of Mad. D. St. Rose, whose daughter was married to Mr. T. B. Caton, a brother of Mr. Caton ; that, on the 20th October, Mr. Caton was obliged to come to England, where he was detained until the 19th November ; that, during his absence from Paris, Mrs. Caton formed and carried on a criminal intercourse with Major Edmond St. Rose, who with his wife also occupied apartments in the house of Mad. D. St. Rose, and many indecent familiarities were observed to pass between them ; that Mr. Caton returned to

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Paris on the 19th November, 1843, and on the 2nd December, he and his wife, Major St. Rose, Mr. T. B. Caton, and others, dined together at the house of Mad. D. St. Rose, during which dinner the conduct of Mrs. Caton towards Major St. Rose was very indecorous; that the suspicions of Mr. Caton had been previously excited by the fact of a letter having been written clandestinely by Mrs. Caton, and of which she refused to give any account; that, at a later period of that evening, a violent altercation took place between Mr. Caton, Mr. T. B. Caton, and Major St. Rose, Mrs. Caton having appealed to Major St. Rose against her husband's endeavours to get her out of the room; that, after the altercation, and in consequence of it, Mr. Caton and his brother left the house and removed to an hotel, and next day he took away from his wife all the children, and on the following day (the 5th) came with them to England; that, at the time of removing them, he required his wife to leave the house of Mad. D. St. Rose, and accompany him to England, where he informed her he would provide her a proper residence, which she refused to do. 12. That Mrs. Caton continued to reside after the departure of her husband in the house of Mad. D. St. Rose until the end of February or beginning of March, 1845; that, shortly before this time, on an occasion when the ladies and gentlemen had left the dining-room, and gone to the drawing-room, Major St. Rose left the room, stating that he was going to attend to his military duties (as major in the National Guard); that Mrs. Caton having also previously retired to her bed-room, Mad. St. Rose, the wife of Major St. Rose, suspecting that her husband had gone to the bed-room of Mrs. Caton, secreted herself in the water-closet on the staircase to watch the door of the room, and she observed Mrs. Caton and Major St. Rose come out of the bed-room and look carefully about; that, as they were descending the stairs, Mad. St. Rose emerged from the closet, and taxed them with having committed adultery together; that Major St. Rose professed great regret for his conduct, and vowed that he would have nothing more to do with Mrs. Caton, who did not deny her guilt; and it pleads that they committed adultery on that occasion. 13. That Mrs. Caton continued to reside at the house of Mad. D. St. Rose until February or the beginning of March, 1845, when she went to reside in lodgings, where she was joined by her mother, and afterwards removed to other apartments, finally at No. 15, Rue Godoy de Manroi, where they resided at the commencement of the suit; that, at all these places, she carried on an adulterous intercourse with Major St. Rose. 14. That, after Mrs. Caton left the house

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of Mad. D. St. Rose, Major St. Rose hired the lodgings for her, paid the rent, put in furniture, and paid for necessities supplied, and during the time she was resident in various parts of Paris he was her constant companion, accompanying her in her walks and drives, taking his meals with her, remaining with her sometimes till twelve or one o'clock at night, and in many respects acting as master of the house. 15. That on one occasion, in September, 1845, Mad. St. Rose was walking in the Boulevards des Capucins, when she observed a carriage stop at the door of the house where Mrs. Caton was residing, from which her husband (Major St. Rose) alighted, and handed Mrs. Caton; that Mad. St. Rose, suspecting that Mrs. Caton was with child by her husband, ran up and placed her hand upon her stomach, exclaiming that she would be satisfied as to her being in the family-way, as the fact was, and which Mrs. Caton did not deny. 16. That, in consequence of such adulterous intercourse, Mrs. Caton, on the 15th October, 1845, was delivered of a male child. 17. That, in 1846, Mrs. Caton, whilst residing in the Place de la Madeleine, represented Major St. Rose to be her brother-in-law, and gave to the concierge of the apartments and his wife a description of her husband, desiring them that, if he ever came to the house, not to admit him; that, while at the said apartments, she frequently gave the child mentioned in the 16th article the breast while Major St. Rose was present, who frequently, on such occasions, would fondle the child while at the breast, and amuse and play with it, and behave towards it as its father, and was taken for its father; and that on many occasions, when Mrs. Caton has been in her bed and alone, Major St. Rose has gone into her bed-room, and remained there for a considerable time. 18. That Mr. Caton, with the view of watching his wife's conduct, and of obtaining proof of her guilt, on the 15th August, 1844, left London and went to Paris on a visit to his brother, residing there in a house adjoining that of Mad. D. St. Rose, where he remained until the 19th November, when he left Paris to return to England, without obtaining any evidence upon which he could rely; that, on the 24th February, 1845, he again went to Paris, accompanied by his solicitor, to obtain the requisite evidence, and being again unsuccessful, he applied to the French Courts, and obtained an order for the compulsory inspection, in the presence of a Commissary of Police, of the writing-desk and other repositories of Mrs. Caton; that Mr. Caton, accompanied by his solicitor and a Commissary of Police, accordingly visited her apartments, but did not discover any evidence to criminate her; that he left Paris on the 1st March, 1845,

and returned to England, and that through his brother, Mr. T. B. Caton, and agents whom he had employed, he endeavoured to obtain evidence of her criminality, but was unable to do so until shortly before the commencement of this suit. 19. That the parties have never cohabited together since 3rd December, 1843.

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No plea was given in on the part of the wife.

*Sir J. Dodson, Q.A., and Dr. R. Phillimore, for the husband, cited Hamerton v. Hamerton.** ARGUMENT.

Dr. Haggard and Dr. Deane, for the wife, cited in addition Grant v. Grant,† and Morris v. Davies.‡

DR. LUSHINGTON.

This case has occupied the anxious consideration May 1. JUDGMENT.
of the Court, not on account of any real doubt I have entertained as to the truth of at least part of the culpability imputed to Mrs. Caton, but from the difficulty I have experienced in ascertaining the due weight of the evidence, as applied to the averments contained in the Libel. Discharging the united functions of both judge and jury, it is not sufficient for the Court to have a moral conviction of the guilt of the party; it must be satisfied that such conviction is founded on and supported by legal evidence, and that legal evidence must be applicable to legal charges contained in the Libel.

The parties were married in 1831, and there were several children the issue of that marriage. Mr. Caton was originally a medical officer attached to the Guards, but, not long after his marriage, he retired from the Army. His wife was the daughter of a clergyman residing at Woodmancote, in Sussex. Mr. and Mrs. Caton, save certain visits to Brighton, resided, from within a short period after the marriage, at Woodmancote, till the death of the father of Mrs. Caton, in 1838. After this event, Mr. and Mrs. Caton lived at Brunswick Square, Brighton, together with the mother of Mrs. Caton.

The 5th article contains the first charge against Mrs. Caton. That article, together with the subsequent articles, up to

* 3 Hagg. E. R. 1.

† 2 Curt. 16.

‡ 5 Cl. & Finn. 163.

MAY 1. the 9th, inclusive, charges adultery with Mr. B. H., in 1841, at Brighton, and sets forth circumstances tending to establish the accusation. Mr. B. H. was a cornet in the 11th Hussars, quartered at Brighton in the spring of that year, and was, with others, hospitably received at the house of Mr. Caton.

Rules of evidence in these cases.

It is a well-known rule in these Courts, that it is not necessary to prove adultery at any particular time and place; but it is, generally speaking, necessary, as I apprehend, to prove that the parties were in some place together where adultery might probably have been committed. Were it, indeed, otherwise, it might happen that guilty intention would be mistaken for actual guilt, and this would be contrary to all principles of justice, as well as to known rules of jurisprudence. In *Hamerton v. Hamerton*,* Sir John Nicholl said: "The Court must be satisfied not only that there has been a surrender of the mind, but of the person." That case was a very remarkable one, and the whole of the observations made by the learned judge are well deserving of consideration. It took place about twenty years ago, and I perfectly recollect, being counsel for the husband in that case, that I was much disappointed at the first result, namely, Sir John Nicholl considered the evidence insufficient to establish the charge of adultery. But after some reflection, and time being allowed for the zeal of a counsel to cool down, I came to the conviction that the decision of the learned judge was founded upon right principles. In that case, as in this, there had been a correspondence between the parties; but the only part of it produced was a letter from the wife's paramour, in the possession of the wife, and that letter was so strong, undoubtedly, that I was led away, as counsel, to form a conclusion that there was enough upon which to found a decision in that letter, without requiring more absolute proof that the parties had been together. That case shows how careful these Courts are and ought to be to require adequate proof of the fact of adultery.

Facts.

Bearing, then, in mind the principles there laid down, and

* 2 Hagg. E. R. 8.

by which I must be governed, I come to a consideration of the facts in this case with regard to the particular charges, and the evidence produced to support them.

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That a change took place in the manner and conduct of Mrs. Caton towards her husband and children, and that her affections were alienated from them, is satisfactorily proved by the testimony of Mrs. Rideout, Mr. George Rideout, and Mary Ann Moody; and all experience shows that such charges strengthen other proof of improper attachment. But I must now look for evidence of the acquaintance of Mrs. Caton with Mr. H. Of undue intimacy between them, or improper familiarity, I can hardly expect to find much oral testimony, for this reason: the plea states only adulterous intercourse generally, and a clandestine correspondence, without setting forth any other facts whatever.

Mrs. Rideout deposes to visits from the 11th of March, 1841, to the 24th; that Mr. H. came to the house of Mr. Caton almost daily; but she says the visits were open visits, known to Mr. Caton, and in the presence of other members of the family. It has not been contended, and indeed could not be contended with effect, that this evidence approximates at all to any inference of adultery, or of an adulterous attachment between the parties. It is proof of intimacy, but not even of improper intimacy; for Mrs. Rideout negatives any appearance of impropriety when Mr. H. made his visits.

The Counsel for Mr. Caton very properly observed that, for this part of the case, they must depend mainly on the letter of Mrs. Caton annexed to the Libel. Now I intend to consider that letter, first, by reference to its contents, and its contents only, and then in connection with the circumstances attendant upon its discovery. At present I will only observe that it appears, by the evidence of Moody, that this was one only of several letters written and sent by Mrs. Caton to Mr. H., and that she received letters from him.

The letter
from the wife.

This letter is in the handwriting of Mrs. Caton, and addressed to Mr. H., at the Barracks. The question is, whether I am to construe this letter as an admission of adultery by Mrs. Caton, or only as a declaration of an improper

MAY 1. attachment. I look to the letter itself. [Read the letter pleaded in the 8th article of the Libel.]
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Now this letter, in my judgment, proves a very strong and ardent attachment on the part of Mrs. Caton to Mr. H., and it proves hatred and resentment against her husband ; but I do not think it contains one word which I can construe into an admission of actual guilty intercourse, which is the construction contended for by the Counsel for Mr. Caton. There is no reference to any past or future meeting of that character. The letter is, indeed, perfectly consistent with past adultery, but it is not proof of it. There is no one expression which, fairly construed, distinctly points to any past adultery, and in this respect the case is not nearly so strong as that of *Hamerton v. Hamerton*, for there the letters in Mrs. Hamerton's custody pointed distinctly to past clandestine meetings. Sir John Nicholl there said: "Some women will go a great way without proceeding to the last extremity of guilt, and the Court must be satisfied not only that there has been a surrender of the mind, but of the person." In this case, I repeat, the fair construction of the letter does not furnish me with any means of concluding that adultery had been committed.

The only strictly legitimate mode of construing this letter is by reference to the letter itself; but perhaps it may be satisfactory to consider it with reference to all the circumstances of the case and the conduct of the parties. It is difficult, however, in such a case as this, to conjecture even any state of circumstances which could convert that letter, if I have put a true construction upon its contents, into admission of adultery already committed, or proof of it.

With regard to the writing and posting of the letter, Mrs. Maria Rideout, on the 6th article, details the facts respecting the writing and delivering of the letter into the post-office; that Mr. Caton's suspicions had been excited, and that the letter was intended to have been posted without his knowledge; that he came to the post-office shortly after, and, by Mr. Caton's desire, Mrs. Rideout saw and was able to identify the letter. Mr. George Rideout states that his brother (since deceased) had an interview with Mr. H., and

that he subsequently accompanied him to a second interview with Mr. H., when Mr. H. gave them an order to receive the letter from the orderly, which they accordingly did, so that it came into their possession without ever passing through the hands of Mr. H. It appears from the answers to the interrogatories addressed both to Mrs. Rideout and Mr. George Rideout, that Mr. Caton had given a written authority for the delivering up of this letter.

I think that nothing material results from a consideration of any of these facts. But it is right to say, that if any inference could be drawn, it would be rather in favour of Mrs. Caton, for it is highly improbable that she would lend any aid to the delivering up of her own letter, if it contained, according to her apprehension, an admission of an adulterous connection, or that Mr. H. would so readily have furnished proof against himself. I am also of opinion that the conduct of the persons concerned, after the receipt of this letter, does not in any degree alter the case.

Mr. Caton, it appears, never saw the letter; perhaps it would have been better if he had, and consulted his own judgment as to the proper course to be pursued. But I attribute no blame to him for having confided in his brothers-in-law. Under the advice of the brothers of Mrs. Caton, he consented to a reconciliation. These brothers, though they had a more ample knowledge of all the surrounding circumstances, did not consider the letter, even coupled with all these circumstances, to be proof of guilt: neither can I. I do not suppose, and should be wholly unjustified in presuming, that Mrs. Caton's brothers thought their sister guilty, and yet endeavoured to make a representation to Mr. Caton contrary to their own conviction. I believe that at the time when the letter came to their hands, and when they advised a reconciliation, they did not think it was proof or admission of an adulterous connection.

For these reasons, the letter, taken in connection with all the circumstances to which I have already adverted, does not, in my judgment, afford adequate proof of adultery.

There are, however, other facts connected with this part of the case which remain to be considered. Mary Ann

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MAY 1. Moody deposes that Mr. Caton left home on the Tuesday week preceding the 24th March; that, on the Saturday antecedent to that time, Mrs. Caton had expressed herself in strong terms against her husband, saying he had falsely accused her, and on the Thursday night following, the witness threw to Mr. H. from the window a note from Mrs. Caton; that Mrs. Caton had previously pressed her very hard to consent to let Mr. H. into the house at twelve o'clock at night. Now this fact is not specially pleaded; it comes out incidentally, and, as I think, naturally, in connection with the evidence the witness was giving. I think the statement entitled to credit, and unquestionably it goes very far to show the *animus* of the lady: had there been any proof that Mr. H. was admitted and had been alone with Mrs. Caton, the Court would have had no hesitation as to its judgment; but the intention, however corrupt, was defeated; the parties did not come together; the evidence, therefore, does not prove adultery, nor can I infer from it that on other occasions Mr. H. did obtain access to the house,—not from this evidence.

To complete the investigation of this part of the case, and before I attempt to draw any conclusion from all the premises, I must notice the facts pleaded in the 9th article, and the evidence taken thereon. The 9th article pleads that, subsequently, Mrs. Caton confessed to Madame St. Rose that she loved Mr. H. more than her husband, and that, in the absence of her husband, she used to let him into the house at Brighton. That is the plea. Now, certainly, I must first observe that the word “subsequently” has a most extensive operation in this article, for it must mean, from any time after the year 1841 to the giving in of the Libel, so that the contents of the article are anything but specific. No doubt there might be much difficulty in fixing the period very precisely; but still, I must say, this extreme vagueness might have been, to some extent, avoided. Now I come to the evidence of the witness vouched; she is examined before the French authorities, and she deposes to the article in the following terms: “In that which confirms the ninth fact, it is correct that Mrs. Caton told me that she had

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received in her chamber in the morning before day Mr. H., and that in the absence of her husband." Again, in a further answer to an "official question," she says: "Mrs. Caton, who inhabited the same house with me, and with whom I conversed sometimes, told me that she was not quite sure by whom she had her child; that she had, in fact, had intercourse with her husband and with a lover, and that she had received this lover at her house in the morning before day. I communicated this confession to Mr. T. Caton." There can be no doubt that, in words, this evidence not only proves the most essential parts of the 9th article, but goes very much beyond it,—the witness speaks to facts not pleaded in the article; but I must now consider how far I can judicially give credit to this witness, with reference to all the circumstances of the case.

Who is the witness? She is the wife of M. St. Rose, whose sister married Mr. Thurston Caton, a brother of the party bringing this suit. But her own husband is in these proceedings charged with committing adultery with Mrs. Caton, and what is very singular to my apprehension, she has been examined to prove that charge against her husband. It may, I think, be doubtful whether Madame St. Rose could be bound to criminate her own husband; I do not say she could not, if she pleased; but whether the law would not have protected her in declining to answer, I think is a doubtful point. But, be that as it may, the attempt has been made to force her to depose against her husband, and the result has been, that she has negatived the article relating to him in a manner which most clearly shows that she had not, as to so much of her evidence, any strong regard for her oath; because all the evidence proves facts and circumstances which she denies altogether from the beginning to the end, and it would be a mere waste of time to go through her evidence to show that, as respects her husband, and his intimacy with Mrs. Caton, the evidence of this lady has been given without the least regard for the oath she had taken.

It is impossible to deny that such disregard of her oath does affect the credit of the witness; false swearing in any

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case must produce such effect; but it may not, therefore, follow that the evidence of the witness is to be altogether rejected. Received, I think, it must be, but considered with very great caution.

But there are other circumstances. There is an almost utter impossibility, as the plea stands, of contradicting the witness if she deposed untruly; no time or circumstance is mentioned; there is nothing in the plea or evidence introductory to the conversation; the evidence too is so brief, and taken in so peculiar a mode, that the Court has no means of forming any opinion from its general tenour. I cannot try it. She speaks of Mrs. Caton not knowing who was the father of the child. Now I do not know from the facts proved in the cause whether at the time when this declaration was made there was a child born at any period to which this declaration would apply. I have not even that test. Nay more; I have no evidence of Mrs. Caton's intimacy with the witness to make such admission probable. Is it not singular that I should have positive proof of quarrels between Mrs. Caton and the witness, Madame St. Rose? In looking at the probability of such an admission, some introductory conversation, or at least some intimacy, might be naturally expected; but so far from any evidence of intimacy, all the evidence is directly the contrary. It is manifest from other parts of the case that, from early in 1843 to the last, Madame St. Rose was extremely irritated against Mrs. Caton on account of her too great intimacy with her husband. How, then, can the Court rely on the declaration deposed to by this witness? There is nothing to corroborate it, except the evidence of Moody as to the admission of Mr. H. into the house, which is too remote for the Court to rely upon.

In drawing my conclusion as to the effect of all the various facts in evidence to support the charge of adultery with Mr. H., I must not forget that no improper familiarity is proved; that no access is established by any witness at a time when adultery could have been committed. Looking at all these facts, I am compelled to say that the proof, judicially considered, is not sufficient, in my opinion, to sup-

port the charge. Moral conviction is the opinion of a jury without a judge; judicial conviction ought to combine the co-operation of both. I must have adequate legal proof, and I am not satisfied that it is adequate. Many cases have occurred, and must occur, in which moral opinion may be one way, but judicial decision another.

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Caton v. Caton.

I must now go back to the date of the discovery of the letter addressed to Mr. H. Mr. Caton, upon the representation of Mrs. Caton's brothers, is induced to renew his cohabitation with his wife. I think no blame is on that account imputable to them or him. From that time, no circumstances occur which, I conceive, have any bearing on the question which I must determine, until the parties become resident in Paris. In August, 1843, Mr. Caton removed with his wife and family to Paris, and resided in the house of Madame Durand St. Rose; and the 11th article then charges the commencement and continuance of an adulterous intercourse with Major St. Rose, the son of Madame D. St. Rose, who, with his wife, was resident in the same house; and it pleads specially the transaction of the 2nd December following, just after Mr. Caton had returned, after a month's absence in England. This transaction is the discovery of a letter written by Mrs. Caton and sent to Major St. Rose, clandestinely, and other circumstances, for which I must refer to the evidence.

Mr. Thurston Caton says, on the 11th article, that, in August, 1843, just before he left Paris to go to Mexico, he made arrangements for his brother and family coming to reside at the house of Madame D. St. Rose, whose daughter he had married, and where he had resided; that he returned to Paris on the 1st or 2nd of December, when his brother and family were still residing in the house, where also were living Major St. Rose and his wife; that on the day of his arrival and the day after, the witness dined there in company with his brother and his wife, and Major St. Rose and his wife, and others; that he did not observe any thing particular in the conduct of Mrs. Caton towards Major St. Rose on either occasion; that Mr. Caton having previously expressed his suspicions that there was something

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going on between his wife and Major St. Rose, after dinner on the second day, when all had left the dining-room except Major St. Rose and his mother, Mr. Caton told the witness that Mrs. Caton had been writing before dinner, and he was certain she had just sent a letter to Major St. Rose in the dining-room, and asked him (the witness) to go and ask Major St. Rose for the letter; that he presumes Mrs. Caton overheard what her husband said, for she immediately followed the witness out into the corridor dividing the drawing-room from the dining-room; that the witness went into the dining-room, and said to Major St. Rose, sitting there with his mother, "I will thank you for the letter which Mrs. Caton has just sent you;" but he denied having had a letter, and, after a word or two of altercation, he left the room. It is unnecessary to go into the history of the altercation which followed; but it does not appear from the evidence that there was any letter at all. The matter stands thus: Mr. Caton suspected that a letter had been sent by his wife to Major St. Rose, who denied it, adding, "If I had it, I would not give it to you." There may or may not have been a letter, for the evidence of Mr. T. Caton proves nothing as to that point. One matter is quite clear, that Mrs. Caton's conduct was most violent. Mr. Caton quits the house, withdraws his children, but offers to receive his wife at Meurice's Hotel, an offer which she refuses. That this was very gross misconduct, to use the mildest term, on the part of Mrs. Caton, there cannot be a shadow of doubt, and I think that Mr. Caton, having had his suspicions excited, did act with great propriety in withdrawing himself and his children, and that her refusal to leave the house justly gave rise to strong suspicions against her. But of any improper intimacy of any kind whatever, there is not even a shadow of proof; nor is there any actual proof of the writing of any letter.

I now come to the 12th article, and that pleads the continued residence of Mrs. Caton at Madame St. Rose's, and her conduct with Major St. Rose there during that time; and it is manifest that, on this article, there is no evidence at all; Madame St. Rose, if it were worth while to

refer to her evidence, negatives it. The 13th article pleads that Mrs. Caton quitted Madame D. St. Rose's in February or March, 1845, and that she then went to reside in various places, of which three are specified, with her mother, and in general terms, and only in most general terms, the article charges the continuance of adultery with Major St. Rose. The 14th article pleads subsidiary circumstances.

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Now, with regard to these three articles, it is extremely singular that I do not find any direct evidence that Mrs. Caton continued to reside with Madame Durand St. Rose after December, 1843,—any direct evidence; and I find none at all as to anything which might have occurred at the house. I say no direct evidence; but inferentially there can be no reasonable doubt of the facts. All the direct evidence is, that Mr. T. Caton says he resided next door from July, 1844, to the early part of 1845. For proof of adultery, therefore, I must look to what occurred at other places.

I must here observe, that Mrs. Caton was accompanied by her mother at the other lodgings which she occupied, and, as it would appear, for a part of the time of her residence with Madame St. Rose. In all ordinary cases it certainly would be presumed that, to a certain extent at least, the mother, the widow of a clergyman, would be some protection and safeguard to her daughter. Mrs. Rideout has not been examined (indeed, there is no defensive plea), and it could not be expected that Mr. Caton would examine her. It is a fact which I cannot leave entirely out of the case,—that, indeed, the evidence renders impossible,—but I have no evidence as to Mrs. Rideout which will enable me to say confidently whether she was properly alive to the conduct of her daughter, or whether she was regardless of her duty towards her; for her duty was unquestionably to protect that daughter from the pollution of adultery. That she was privy to the intimacy with Major St. Rose I cannot doubt from the evidence; but beyond the mere fact I cannot find any adequate means of forming an opinion with justice. Indeed, I have very reluctantly adverted to this circumstance; but I am compelled to do so, for the resi-

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dence of a mother with a daughter, under the peculiar, the very peculiar, circumstances of this case, can never be wholly disregarded, or passed over without comment.

To come, then, to the evidence on the 13th, 14th, 15th, and 17th articles. First, there is the evidence of the Moussus, the porter and his wife. The wife, at the conclusion of her evidence, states that Mrs. Caton had servants of her own to attend upon her; that she (the witness) was constantly occupied in other apartments, and had very little opportunity of seeing what passed in Mrs. Caton's apartments. The husband states that he might be up in the apartments twice in a month,—never of a night. What facts do these witnesses prove? A very great intimacy on the part of Major St. Rose with both mother and daughter,—an intimacy so great that, if there had been proved any previous attachment, or any act approaching to indecent familiarity, the Court might at once have attributed that intimacy to an improper motive, and perhaps have come to the conclusion that, on some occasion, though there was no direct evidence, adultery had been committed, notwithstanding the presence of Mrs. Caton's mother in the apartments. But the Court has no such proof from these witnesses. I cannot take the 12th article as proved where there is no proof at all; I cannot supply proofs by presumption, however natural such presumption may be.

In this house (where resided the porter and his wife) were resident Mrs. Rideout, Mrs. Caton, and two children, one six weeks old. I observe, incidentally, as I pass, that Mr. Caton sent back to his wife one of the children, and Mr. T. Caton, in his evidence, states that he recommended this, as he did not believe this child to be the child of Mr. Caton. Who he supposes was the father of the child, the Court is left wholly and entirely in the dark. Now Major St. Rose acted as master of the house in many respects; occasionally he took the child in his arms,—a child six weeks old; he went out constantly with Mrs. Caton, but her mother went too, and Mrs. Caton ordered that her husband should not be admitted. On one occasion, Mrs. Caton was seen nursing the child in the presence of Major St.

Rose,—an act, no doubt, of great indelicacy,—but the porter was present. The strongest fact is Major St. Rose going into Mrs. Caton's bed-room, and I will advert to that part of the evidence.

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The porter says : “ M. St. Rose acted in the apartments occupied by Mrs. Caton quite as if he were at home. When I have been engaged up there, I have several times seen him go in and out the bed-room occupied by Mrs. Caton, as well when she has been therein as otherwise. One time, when I was engaged nailing down the carpet in the room occupied by the nurse-maid and child, and which room has a door of communication with Mrs. Caton's bed-room, I saw M. St. Rose pass through that door into Mrs. Caton's bed-room. He shut the door after him. I was previously told by the servants of Mrs. Caton being then confined to her bed by illness. I did not see her in bed, but I heard her voice speaking with M. St. Rose in her bed-room. During the quarter of an hour or more that I continued afterwards in the said room, I did not see M. St. Rose leave the bed-room, and I heard his voice in the interval, talking with Mrs. Caton, in the bed-room. I do not know if there was any one else present with them : I heard no voice but theirs.”

Now this is not to be taken as an isolated fact, but in conjunction with all the other facts ; at any rate it proves this : whether adultery was committed at this particular time or not, I do not say ; but it undoubtedly proves a familiarity most improper and very disgraceful.

I now go to the evidence of Kaines. She was during part of the time living as lady's maid with Mrs. Rideout, from the 17th July, 1845, until the 8th April, 1846, and she says that Major St. Rose used to be coming to the house, visiting Mrs. Rideout and Mrs. Caton, pretty well every day : “ in fact, he was looked upon by their servants more as one of the family than as a visitor.” She says she did not suspect that there was any improper intimacy between Mrs. Caton and Major St. Rose until his wife came and “ made a piece of work ;” but from that time she firmly believed that they carried on an adulterous intercourse. “ I come to that con-

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clusion," she says, "not from any direct act which I myself witnessed pass between them,—for Mrs. Caton having her nurse to attend upon her as her maid, I had not the opportunity of seeing so much as I might have done had I waited upon her myself;—but from seeing him and her so much together, and knowing them to be shut up together alone in the absence of my mistress at times for considerable periods. I did once go into the drawing-room, when they were alone, and see Major St. Rose and Mrs. Caton sitting on the sofa together, and I then observed that her dress was more open at the bosom than I thought proper. She was near her confinement, and, from her dress being open, a part of her bosom was exposed. That was the nearest approach to an act of impropriety that I witnessed between them." She says Major St. Rose used to be in company with Mrs. Caton and her mother great part of the day, and when Mrs. Rideout was out (and she went out for a walk most days), he would be in company with Mrs. Caton alone for an hour or two. If Mrs. Caton went out, it was for a drive in a carriage; but she never knew Major St. Rose go out with her unaccompanied by Mrs. Rideout.

This is, I think, the substance of her evidence, and there is nothing in it beyond the proof of a very great intimacy between Major St. Rose and Mrs. Caton. We must not, however, look at these as isolated facts, but in conjunction with all the facts in the evidence, and especially with this fact, that Mrs. Caton was aware that her husband suspected her of an improper intimacy with Major St. Rose.

However, before I pronounce my final opinion, I am bound to look at the other evidence in the case. There is nothing in the evidence of Deslandes; Retaux was in Mrs. Caton's service from May, 1847, to January, 1848, and his evidence in no degree supports the charge, unless I could infer criminality from intimacy alone.

The 16th article pleads that, in consequence of the criminal intercourse with Major St. Rose, Mrs. Caton became pregnant, and was delivered of a full-grown male child on the 15th October, 1845. The birth of this child is proved, and as to the effect of such proof I must presently address my attention.

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The 17th article pleads orders by Mrs. Caton to refuse admission to her husband; but I have already dealt with the evidence relating to this article. I pass over the 18th for the present, and come to the 19th, which pleads cessation of cohabitation from the 3rd December, 1843. Now, certainly, if this article be proved, together with that part of the 16th article which alleges the birth of the child on the 15th October, 1845, it is self-evident that the child was not Mr. Caton's, and it is equally self-evident that Mrs. Caton had committed adultery with somebody. If the child was born in October, 1845, and cohabitation had ceased in December, 1843, *cadet questio*.

Here the question arises, which has pressed me throughout the whole of this case, and which requires great consideration:—Could I, upon this state of the pleadings, supposing I am satisfied with the proof of non-access, pronounce the adultery established by evidence, though I may doubt whether the proof is sufficiently stringent to identify Major St. Rose as the adulterer? I have read the 16th and 19th articles, and I think the state of the pleadings very important. State of the pleadings.

The spirit, as well as the letter, of the 16th article is to charge adultery with Major St. Rose; the object of the 19th article is not to prove that the child must have been a bastard, in consequence of non-access,—decidedly not; it is the common and usual article wherever a charge of adultery is alleged, and is intended solely to show no condonation by intercourse, and very slight proof of such an article for such a purpose is always deemed sufficient. Where it is intended to prove adultery by showing the birth of a child, and non-intercourse of the wife with the husband, the pleading is wholly and entirely different; the article pleads specifically the absence of the husband during the period of gestation, the whole period antecedent to the birth of the child, and where he was, so as not only to rebut the ordinary presumption of intercourse, but to prove directly non-access.

It may, however, be said, what does the form of the pleadings signify? What matters it, if the articles are shaped *alio intuitu*, if proof of the adultery be forthcoming?

MAY 1. *Caton v. Caton.* The answer to this question is, that, in many cases, the pleadings are of the greatest importance to substantial justice. The maxim of these Courts, and I may say of all other Courts, is to decide *secundum allegata et probata*. There must be both charge and evidence: the party cited is entitled to know the specific charge for the purpose of defence. Suppose A to be charged with the commission of adultery with B, and the evidence should show that it was committed with C; could the Court decree according to the evidence? I apprehend, certainly not; except, indeed, a case could be supposed in which the accused had still an opportunity of defence, if such case could occur. Suppose a man charged with larceny against A, would he be prepared to meet a charge of the same offence committed against B? Decidedly not. The rule is, to determine a case *secundum allegata et probata*, one of the most universal rules in all Courts, and consistent with the fundamental principles of jurisprudence. The difficulty I feel is to avoid the error of adhering to this rule with pedantic strictness, and, on the other hand, not to weaken a rule which is founded on one of the great principles of justice.

Nor is this the only difficulty arising from the case being now put in argument on a foundation not directly laid by the pleadings; another inconvenience arises, namely, that the evidence taken upon the 19th article is just the evidence to be expected from an article so framed, that is, to exempt the husband from a suspicion that he returned to cohabitation after his knowledge of his wife's adultery. The 19th article is, as I said, the ordinary article; and the evidence on that article is neither so precise nor so particular as it would have been had the article been framed to prove the child not to be the offspring of Mr. Caton.

The witnesses are Mr. T. Caton, the Rev. Mr. Caton, and Mr. Waugh. I will see what is the evidence given by these gentlemen, though I may not be entitled to use it.

Mr. T. Caton's evidence upon the 19th article is: "To the best of my knowledge, my brother has not ever cohabited with his wife since he left her in Paris in December, 1843." Mr. Caton may have been and was in Paris in the

interval. The Rev. Mr. Caton's evidence is as follows:

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"Since my son's separating himself from his wife in December, 1843, he has had his home principally with me; he has not since ever cohabited with his wife, to the best of my knowledge and belief."

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This is the evidence of non-access, and I feel no difficulty in stating that this evidence would be wholly insufficient to prove adultery by non-access only. Then where is the Court to find such evidence? I must go to a different quarter; to an article *alio intuitu*; to the evidence given on the 18th article, and to what I can pick out from the answers to the Interrogatories.

The 18th article is framed wholly *alio intuitu*; it is framed only for the purpose of vindicating the conduct of Mr. Caton himself (with which I am perfectly satisfied), and showing that he has been duly active in prosecuting his inquiries as to his wife's conduct, and in endeavours to procure sufficient evidence of her guilt to satisfy the Court; all that is pleaded as to his visit to Paris or his residence elsewhere is ancillary to this purpose, but was not intended to prove non-access, which, if it proves, it proves by accident.

Now let us look at the evidence upon this article, not to prove what it was intended to prove, but what it may prove incidentally, and let me see what I can make out from it, and consider how I can deal with it afterwards.

I think Mr. T. Caton proves that Mr. Caton was in Paris from August to November, 1844; and again in February, 1845. It is from this affirmative evidence I am to argue negatively that Mr. Caton was not in Paris at any other time; and this being assumed, by inference from the evidence, that he had not access to his wife. Now to be sure a more inconvenient mode of arriving at such a conclusion could not well be conceived; and this without any direct affirmative proof of Mr. Caton's residence elsewhere, except that it comes out incidentally from the evidence of his father that he was chiefly resident with him in London. But it does come out fortunately that he was chiefly resident with his father. On the 22nd Interrogatory, Mr. T. Caton, so

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far as the Interrogatory will permit, negatives all intercourse between Mr. and Mrs. Caton in the autumn and winter of 1844, and fortunately it was that such Interrogatory was put. Again, the Rev. Mr. Caton, on the 10th Interrogatory, states his belief of there being no cohabitation. But there is the more important evidence of Mr. Waugh to account for the purpose for which Mr. Caton went to Paris in February, 1845, namely, to obtain evidence against his wife, and he states that they left Paris on the 1st March, and that since then Mr. Caton has never again been in Paris.

What is the result of this evidence? I am satisfied that I can spell out by inference that Mr. Caton was not in Paris from November, 1844, to February, 1845, and that he had not, in February, 1845, access to his wife,—facts which ought to have been pleaded and deposed to directly, and which could have been done with the greatest ease. Then how am I to apply this conviction, in the present state of the pleadings, to the 16th article, pleading that the child is the child of Major St. Rose? I do very greatly doubt whether I am at liberty to say that adultery is proved, no matter with whom. If I were so to hold, I should be taking evidence without any specific charge, and which, if the charge had been made, Mrs. Caton might have met, and proved the charge to be untrue. I do very greatly doubt it; and this brings me back to the question, whether all the circumstances taken together amount to proof of adultery with Major St. Rose. I have certainly felt pressed by the absence of all proof of indecent familiarities; by the absence of all proximate acts which might reasonably have been expected during that long intimacy. I have felt, too, that such a connection could hardly subsist without the connivance of Mrs. Rideout, which I am not justified in suspecting. On the other hand, here is a long-continued intimacy, exciting the suspicions of Mr. Caton, and under circumstances which I cannot explain consistently with innocence. I cannot look at the evidence as to the entrance of Major St. Rose into Mrs. Caton's bedroom; I cannot look at her nursing the child in Major St. Rose's presence; I cannot

look at his attentions to the child,—I cannot look at all these circumstances, and the quarrel on his account, without being of opinion that they raise a strong presumptive proof of guilt; and when I consider that, on the part of Mrs. Caton, there has been no attempt at defence, no attempt to examine her mother, Mrs. Rideout, or the servants, and also that a child was born during the intimacy,—looking at all these facts, I think I am judicially warranted in pronouncing that adultery has been proved with Major St. Rose; though I do not attempt to conceal that I have arrived at this result with some difficulty. At the same time I am satisfied judicially that I am in a condition to pronounce for the divorce on the ground of adultery committed with Major St. Rose.

MAY 1.
Caton v. Caton.

Divorce pronounced for.

Proctors:—*Gleason*, for the husband; *Curry*, for the wife.

Archbishop's Court of Canterbury.

MAY 2.

3rd Sess.

FELL v. BOND AND OTHERS.—*Appeal.*—*Cause.*—This was an appeal from an Order or Decree of the Reverend James Thomas Law, Clerk, Chancellor of the Consistorial and Episcopal Court of Lichfield, whereby he admitted Edward Bond, William Greene, Charles Gresley, and Robert William Hand, as Procurators General of that Court; the appeal being prosecuted by William Fell, one of the Proctors of the said Court, whose objection or protest to their admission had been overruled. In the first instance the Judge had been made a party to the appeal with the four Respondents, and an appearance was given for all of them under protest, which the Court* sustained as regarded the Admission of Proctors in a diocesan Court:—the decree of a Chancellor of such Court, admitting persons not qualified according to the practice of the Court, — reversed on appeal.—*Semble*, that, independently of a rule or practice, it is not reasonable

* 6 Notes of Ca. 209.

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that a judge should exercise the power of admitting whomsoever he pleases, or that some particular qualification should not be required.

Chancellor, whom it dismissed, but overruled the protest in respect to the four Respondents, who then appeared absolutely.

In the Court below, the petitions of the Respondents alleged, as the grounds on which they were qualified for admission to practise as Proctors in that Court, that they were admitted Attorneys and Solicitors in the Courts of Common Law and Equity, and were practising as such; that one of them had been clerk to the Dean and Chapter, and another secretary to the Bishop. The objection raised to their admission on the part of Mr. Fell was, that the necessary qualification for admission to practise as a Proctor in the Court of Lichfield was, that the party should have served five years to a Proctor in that Court, or a Notary Public practising there, and should have exhibited a certificate of such service, to be filed in the Registry, and that in neither of these instances had there been such service, or such certificate exhibited.

In this Court, an Allegation was given in on behalf of the Appellant, which pleaded:—

That, according to the ancient, constant, and existing practice of the Consistorial and Episcopal Court of Lichfield, and according to the ancient, constant, and existing usage therein, always observed and adhered to, no person whatever of right ought to be or can lawfully be admitted as a Procurator of the said Court, unless such person has, before such admission, duly served under Articles of Clerkship for five years, at the least, to a Procurator General or Notary Public practising and exercent in the Court, nor unless such person, before admission, produce a Certificate in writing of such service and qualification to the Registrar of the Court, to be filed in the Registry; and that all persons who have ever, before the pretended admissions of the Respondents, been admitted as Proctors in the Court, have so served, and produced such Certificate to the Registrar, and that such Certificates have always been and are regularly filed therein: That no person whatsoever hath ever at any time before the admissions now in question, either by the present Chancellor of Lichfield, by any of his predecessors, or by any other person, been admitted as Procurators of the said Court, without having before his admission duly served under Articles of Clerkship for five years to a Procurator

General or Notary Public practising and exercent in the Court, nor without having before his admission produced a Certificate of such service and qualification to the Registrar of the Court : That neither of the four gentlemen had served under Articles of Clerkship to any Procurator General or Notary Public exercent in that Court, or in any other Ecclesiastical Court, nor had either of them produced a Certificate of service or qualification : That the Reverend James Thomas Law holds his offices of Vicar General and Official Principal by virtue of a certain Grant or Letters Patent, dated 13th February, 1821,* under the hand and episcopal seal of the then Lord Bishop of Lichfield and Coventry, ratified and confirmed by the then Dean and Chapter of Lichfield, in a Confirmation or Deed under the seal of the Dean and Chapter, on the 23rd February, 1821. (The Letters Patent were not produced, and it is pleaded that application had been made to Mr. Law on behalf of Mr. Fell to produce them, for the purposes of this Appeal, but he had refused to do so.) That Mr. Law has not, under or by virtue of the Grant or Letters Patent or Confirmation, any power or authority to present, appoint, or admit any person as Procurator, or to act as such, in the said Court, and that no such power has ever been granted to him by any other instrument in writing or under seal.

MAY 2.
—
Fell v. Bond.

No Allegation was given in by the Respondents, but interrogatories, with exhibits annexed, were administered to the witnesses examined on behalf of the Appellant.

Sir J. Dodson, Q.A., for the Appellant.—This is a claim April 16.
on the part of the Chancellor of the Court of Lichfield to ARGUMENT.

* The Letters Patent, granted to the Rev. James Thomas Law, M.A., the offices of Vicar General in Spirituals and of Official Principal of the Consistory Court of Lichfield and Coventry, with all wages, fees, rewards, dues, salaries, profits, commodities, and emoluments whatsoever to the said offices belonging, reserving to the Bishop the power of executing them in person; with power and authority to take cognizance of causes, suits, and complaints in matters of Ecclesiastical jurisdiction, with their incidents and emergents; "nevertheless with this proviso, that it shall not be lawful for him to remove from or deprive of their office of Proctor any Proctors or any person exercising the office of a Proctor of the said Court, that have or has been lawfully admitted and constituted, or shall be so admitted or constituted hereafter, without the consent and approbation of the Bishop first had and granted."

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appoint whom he pleases to be a proctor of his Court. There is no assertion in plea of this power in the Chancellor; whereas it is incumbent on the Respondents to make good their case. Is this assumed power just to the profession and to the public? In the first place, the consequence of letting in any one he pleases will be to swamp the profession; to take away the benefit of service from those who have been regularly admitted, after paying a considerable sum. In the second place, it would lead to much public inconvenience, for what security would there be that the persons admitted would be duly qualified? This Court has no such power. There is the evidence of two witnesses that no persons have ever been admitted in the Court of Lichfield without service and a certificate.

Dr. Harding, on the same side.

Dr. Addams, for the Respondents.—The first question is, what is the present position of the Court of Lichfield? Nominally, there are two proctors in that Court, but practically none at all; so that the admission of these four gentlemen, making an aggregate of six proctors, cannot be a swamping of the profession. As to their qualifications, they were duly articulated to an attorney for five years, were two years in a London office, and were admitted attorneys by the Court of Queen's Bench, and solicitors in the Court of Chancery. The real question is, whether the Chancellor has abused the power by a capricious or corrupt exercise of it; for unless this be shown, or that some great practical inconvenience would result from it, there is no reason for disturbing his decree.

Dr. Robinson, on the same side, referred to the want of uniformity in the practice of the different diocesan Courts, as shown in the Report of the Ecclesiastical Commissioners, in 1832.

MAY 2.

JUDGMENT.

SIR H. JENNER FUST.

The Court took occasion to observe, when the case came on for argument, that it was somewhat imperfectly instructed, and, on further consideration, I see no reason to depart from the observation, for it is to my mind still im-

perfectly instructed. Nevertheless, the Court must proceed to determine the case as it stands before it.

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The ground on which the Court is called upon to proceed in this case, either to reverse or affirm the Decree, depends upon what is the practice of this Court at Lichfield. There is no general rule laid down by which Ecclesiastical Courts are governed in admitting Proctors to practise in those Courts, but each Court seems to have its own practice. As far as the Court can ascertain, looking at the proceedings before it, it seems that the practice varies in several Courts; that in some a special Commission issues at the *fiat* of the Bishop, whose Court it is, for the admission of a Proctor; that, in some, the Proctors are appointed by the Judge, with the approbation of the Bishop; that, in others, the Bishop issues a general order for the admission of Proctors; but in other Courts a practice has grown up, as it should seem, of admitting certain persons with certain qualifications, and with these qualifications only they shall be admitted. In this Court, it is well known,—and the Proctors admitted to practise here are entitled to practise everywhere else,—a Special Commission issues in every case where a person is to be admitted, and the petition states that the person has served seven years to a Proctor of the Court, and they are Notaries Public always before they are admitted; and so in many other Courts. The same course of proceeding takes place at York after a service of five years. In other Courts, no particular qualification is required, though in others a service of five years is requisite for a qualification to be admitted.

Practice various.

We have no general order in this particular case, and a question has been raised in the Argument, whether it has been sufficiently established what the practice in the Court of Lichfield has been. That some qualification should be required is no very unreasonable demand; that some knowledge of the principles and practice of the law which is to be administered in the Courts in which persons claim to be admitted as Proctors should be possessed by them would be no unreasonable requisition. It cannot be that any person who applies to be admitted a Proctor of the Court is enti-

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tled to be so admitted. It can hardly be contended that any Judge should be entitled to say, "I will admit such and such persons, without any qualification, to practise in the Court." There may be cases in which the necessity of the case may require that persons who have no peculiar qualification for the office may be admitted, and in that case they must do the best they can; but I do not think it an unreasonable demand that some qualification should be required.

That the Letters Patent of the Chancellor of the Diocese of Lichfield do not in terms confer any such power of admitting whomsoever he may think proper to practise in that Court appears on the face of the Letters themselves. There is reserved to the Bishop of the Diocese in the Letters Patent the power of deciding for himself whether a person once admitted a Proctor shall be deprived of his office, and I cannot but think that this does to a certain degree intimate, that where the power of determining whether a Proctor once admitted has been rightly deprived of his office, or not, has been reserved, it should seem to be a part of the right and privilege of the person so reserving such power, that he should also have the power of admission, and of saying whether a person should or should not be admitted to practise in the Court. But be that as it may, the question here is, what has been the practice of the Court of Lichfield, and whether, if the practice is so proved, the Court can find out what it has been; or if not clearly proved, yet from what appears on the face of the depositions and evidence, it can say what has been the usual, constant, and invariable practice of the Court.

Practice of
 the Court at
 Lichfield.

The Allegation, as I have said, alleges that no person can be admitted in that Court as a Proctor unless he has served five years to a Proctor exercent in that Court, or a Notary Public, and that none of these persons, who have been admitted by the Chancellor of the Diocese, have qualified themselves by such service. Two witnesses have been examined in support of this Allegation; one of them is Mr. Mott, the Deputy Registrar of the Court. He is one of the Proctors of the Court, but being also Deputy Registrar of the Court, he does not consider himself entitled to act as

Proctor in the management of suits in the Court, and it appears that there are only two other Proctors exercent in the Court. It appears that the usual number of Proctors has been four ; sometimes there have been six, but at present there are only four Proctors, one of whom is Deputy Registrar of the Court, and another is a gentleman who, it appears, is serving his clerkship, and at the end of five years, he will be qualified to be admitted according to what is stated to be the practice of the Court.

Mr. Mott has been the Deputy Registrar of the Court since 1826, when he was appointed on the death of his father, who held the office from the year 1780. Mr. Mott states that he was articted to his father, and served him for five years previously to his being admitted a Proctor, and he says, " I depose that, as far as my experience of the Court extends, I have always known it to be the invariable custom and practice, and which practice exists still, to require, previous to the admission of a Proctor, a service of at least five years, under Articles of Clerkship, to one of the Practitioners of the Court. All the Practitioners are Notaries Public. My father was a Proctor and Notary, and I served him under Articles for the required period, and all the Practitioners now exercising the duties of Proctor in the Court have served, to my knowledge, the said required period to one or other of its Proctors and Notaries ; and it is and always has been required that, previous to any admission of an Articled Clerk as a Proctor (and none but articled Clerks can be so admitted), a certificate should be exhibited from the Proctor and Notary himself, and from some other Proctor, of the fact of such service, and of the other qualifications, as to good conduct and the like. I have now with me (which I produce to the Examiner) three of such certificates, bearing date respectively in the years 1806, 1837, and 1842, and all of them signed in addition either by the principal Surrogate or the Deputy Registrar of the Court. In fact, I know not of any instance of any person having been admitted to practise as a Proctor in the Court without such previous service, and the production of a formal certificate thereof ; such certificates are filed in the Registry. The only

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other instance of an admission to the office of Proctor that has happened in my time, is one where the certificate is missing; but that happened on the death of my father, and of my own knowledge, as the newly appointed Deputy Registrar, I am sure the certificate was produced, though it is now missing."

Mr. Mott has been interrogated as to whether he knows, or has any reason to believe, that no person has been admitted as a Proctor of the Court who has not served a clerkship for five years, and produced a certificate, and he says he will not swear that no person has at any time been so admitted; he can only swear that such has been the case during the forty-two years of his experience.

Mr. Walthew, a clerk in his office, confirms his statement, as far as his experience goes, and there is nothing stated on the other side; not a syllable is produced on the other side, from which it can be collected in any manner that there has been any other practice in the Court of Lichfield. The circumstance of Mr. Mott having been admitted, and the other gentlemen, after five years' Clerkship, proves the existence of the practice long before their time. Why should they have served five years if it was not necessary to qualify them? Why should Mr. Mott's son serve for the purpose of qualifying him to be admitted? Why should all these gentlemen, probably, in some instances, have paid high premiums on being articulated (as we know is the practice), and certainly a stamp-duty to a considerable amount,—why is all this done if it is to be assumed that no qualification at all is necessary; that the Chancellor may appoint whomsoever he pleases? Most respectable men, I have no doubt, these Respondents all are; exceedingly good Attorneys and Solicitors, and, so far as their knowledge extends, very proper to be admitted, so far as their general qualification goes; but they have no particular acquaintance with the law of the Court in which they are seeking to practise. Is it an unreasonable demand that some means of acquiring that knowledge should be exacted? Surely not; surely it never can be said to be an unreasonable demand of qualification,

that some means of acquiring that knowledge should be possessed by those who come to be admitted as Proctors.

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What are the matters adduced on the other side, annexed to the Interrogatories? Merely amounting to this: the absence of any recital, in the acts admitting these persons, that they had served their Articles of Clerkship. But this is no ground whatever for supposing that they had not served their five years' Clerkship, when I find that from 1821, when Mr. Law became Chancellor, no instance has been produced in his time of the admission of a person who had not served Articles of Clerkship. Then I say, *As pleaded.* this is the practice of that Court; I do not mean a custom beyond the memory of man, but a practice in existence to be assumed from the fact, which appears proved by the evidence before the Court, that this is the first instance in which it has been departed from. I cannot, therefore, say that there can be for one moment a doubt in the mind of the Court as to the existence of the practice. I cannot see what doubt the Court can have as to the rule, and as to the reasonableness of the rule; nor can I see anything stated from which the Court can collect that an additional number of Proctors is necessary, from the amount of the business of the Court; that it is such as to require that there should be an additional number of Proctors appointed, however imperfectly qualified they may be to conduct causes. Mr. Mott considers himself not entitled, but there are two other gentlemen who are competent, to conduct causes; and nothing is stated to show that any inconvenience has arisen, or that any essential inconvenience may arise, from any want of a sufficient number of Proctors to afford a reasonable choice to the suitors in the Court. Some facts must be laid before me to show what the state of the business of the Court is which requires an additional number of Proctors, and beyond that, not only that an additional number of Proctors is required, but that Attorneys and Solicitors are sufficiently acquainted with the Ecclesiastical Law to conduct the business of the Court. Perhaps it may be so; perhaps these gentlemen may have acquired sufficient

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knowledge, or what in their opinion is a sufficient knowledge, of Ecclesiastical Law to qualify them to practise; but I have nothing stated before me which should render it necessary to make an exception. Those gentlemen who are now practising have served a five years' Clerkship, and have incurred considerable expense in the previous acquisition of knowledge to qualify them for this particular profession; there is another gentleman training up to follow in their steps, serving his Clerkship; and, under these circumstances, I am of opinion, in the deficiency of any evidence to the contrary, that there is sufficient proof that there has been a practice existing in the Court of Lichfield, and that there is quite sufficient to justify this Court in assuming that it has been an invariable practice in that Court, and if this Court were to uphold the Decree of the Chancellor of the Diocese, admitting these four gentlemen, upon the simple proof that they were Attorneys and Solicitors, it would be to say that, at Lichfield, where Proctors have always been considered as qualified only by a certain number of years' Clerkship to a Proctor, nothing more is requisite than these Respondents possess, and, in fact, it would be to destroy the whole race of Proctors in that Diocese at last; for no person would subject himself to the inconvenience of serving five years, and paying a considerable stamp-duty, if no such qualification were necessary.

Decree reversed. Upon this ground, I am of opinion, in the present state of the information which the Court possesses, that the Decree of the Chancellor of the Diocese cannot be sustained, and I reverse that Decree. It is not a case for costs; it is a question *primæ impressionis*, and very proper to be discussed. I therefore content myself with pronouncing for the Appeal, reversing the Decree appealed from, and I retain the Cause, rejecting the Petition of the Respondents in the Court below.

Proctors: — *Wadeson*, for the Appellant; *Toller*, for the Respondents.

High Court of Admiralty.

MAY 4.

3rd Sess.

THE "GAUNTLET" (KENNEDY).—*Motion*.—This was an action upon a bottomry-bond, which the Court pronounced for,* referring the amount to the Registrar and Merchants, who reduced it from £1,961. 11s. 6d., claimed by the bondholder, to £475. 8s. 6d., their Report being confirmed. The question of costs having been reserved, the Court was now moved to condemn the bondholder in the whole costs.

Dr. Harding and *Dr. Bayford*, for the owners.

Dr. Addams and *Dr. Robinson*, on behalf of the assignees of the bondholder (*Jeffries*), who had become bankrupt, submitted that, as the principal reduction had reference to a claim for salvage, which would be brought before the Court in another form, and as the owners were not justified in questioning, as they had done, the validity of the bond, making groundless charges against the bondholder, the assignees should have the costs of the original suit, and those of the reference should be divided between the parties.

Bottomry.—Where the validity of the bond was disputed by the owners of the ship, who failed to establish the charges they brought against the bondholder, and the Court pronounced for the bond, referring its amount to the Registrar and Merchants, who reduced it from £1,961 to £475,—the Court made no order as to costs in the principal cause, but condemned the bondholder in the costs of the reference.

DR. LUSHINGTON.

I very well remember all the circumstances connected with this case. It was a case which necessarily, from its bulk and complexity, occasioned the Court to bestow upon it very great consideration before it pronounced its decision. After duly considering the facts and evidence, I came to the conclusion that the bond was valid, and pronounced accordingly. Conformably to the usual course of proceeding in these Courts, and according to all natural principles of justice, where a plaintiff in a cause has succeeded so as to have the instrument, which he alleges to have been duly executed, pronounced for, he is entitled to have his costs, in addition to the value of that instrument. But, in the course of the discussion, though I was satisfied that the

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* 6 Notes of Ca. 370.

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Gauntlett.

necessity for taking the bond was proved, and though I did not think that any of the charges which had been preferred had been sufficiently established, yet there were many facts and circumstances connected with the items that raised very great suspicion in my mind, and therefore I did not follow the ordinary course, in pronouncing for the bond, of decreeing costs to the bondholder. I referred the case to the Registrar and Merchants to ascertain the proper amount due, and I reserved the question of costs, for this plain and obvious reason—namely, that although the bondholder, according to the usual practice, would be entitled to the costs upon having his bond pronounced valid, yet it never could be contended that he would have the same right to costs if it should turn out that a very small part of his demand was justifiable, and that the larger part of it ought not to have been included in the bond.

Three courses are now open to the Court—to decree costs to the bondholder, to condemn him in the costs, or to leave each party to pay his own costs. My judgment has been regulated by what has taken place since the decision of the case. The Registrar and Merchants have reported that the sum of £1,961. 11s. 6d. was claimed, and that £475. 8s. 6d. only is due. That Report has been confirmed, and, in strictness, I consider the whole of it is absolutely binding upon the Court—that it is not competent, even to the Court itself, after it has confirmed a Report which might have been objected to, to look at any part of it, and allow it to be objected to now. The Court, in referring the case to the Registrar and Merchants, did not allow them to enter upon a consideration of the claim for salvage, and it is said that the principal ground of deduction has arisen from following this direction of the Court. That may be so; but it is not competent to me to go into the Report to show whether they were right or wrong. This, however, is abundantly clear, that if that observation be well-founded, why was a demand of 4,560 dollars made by way of salvage, in the teeth of the restriction imposed on the Registrar and Merchants? I am of opinion that the reduction which has been made is a circumstance that ought to weigh greatly with the Court in

disposing of the question of costs. Where a man makes a demand so exorbitantly large as this appears to have been, and fails to so great an extent, he is not entitled to his own costs, because the demand ought to have been of a totally different description. On the other hand, with regard to the claim of the shipowners for their costs, I think they are not entitled to them, because I pronounced, upon a consideration of all the circumstances, that there was no case made out against the validity of the bond, and of the items I could form no judgment. They failed in their charges. They might have admitted the validity of the bond; but having preferred charges which failed, they cannot, on that account, have any claim at the hand of the Court to receive the costs.

MAY 4.

Gauntlett.

Therefore, my decision is, that I give no costs to any party in the principal cause. With regard to the reference to the Registrar and Merchants, there is no doubt whatever that, that reference having been made, and the party resisting having so far succeeded in that reference, I am bound to give him the costs of the reference itself.

No costs in the cause.

Costs of reference.

Proctors:—*Smale*, for the owner; *Toller*, for the bondholder.

Prerogative Court of Canterbury.

MAY 5.

3rd Sess.

IN THE GOODS OF MARTHA BEADLE, WIDOW, DEC.— A will signed *Motion, ex-parte*.—The deceased died 21st January, 1849, leaving property under £1,000. She left a will (not disposing of the residue), dated 20th November, 1848, which was written on the first, second, and part of the third sides of a sheet of paper; it was signed by her, and attested by two witnesses, A. H. and E. P., in the following manner. Immediately after the end of the will, in a fresh paragraph,

A will signed below the attestation - clause (which immediately followed the will, and was written across the paper), a blank space intervening, and above

MAY 5.

Beadle, dec.

the signatures
of the wit-
nesses, — ad-
mitted to pro-
bate.

written, like the body of the will, across the page (save a narrow margin on the left side), is the attestation-clause: "signed, sealed, published and declared by the said Martha Beadle, as and for her last will and testament, in the presence of us, who subscribed our names as witnesses thereof at her request and in her presence and in the presence of each other." Then follows, a blank space of about two inches intervening, the signature and attestation, in this form:—

Witnesses

{ Martha Beadle.
A. H.
E. P.

MOTION.

Dr. Bayford moved for probate, arguing that the attestation-clause, being written close to the conclusion of the will, prevented the signature being placed otherwise than below the clause, which, however, precluded any addition to the will.

DECREE.

SIR H. JENNER FUST.

For these reasons, I think the paper may be admitted to probate.

Searlock, Proctor.

A testator, **IN THE GOODS OF JOHN HARPER, DEC.**—*Motion, ex parte.*—The testator died 12th March, 1840, leaving property, real and personal, of small value. On the 10th November, 1837, he executed a will, prepared by C. B. Wood, a solicitor (one of the attesting witnesses), whereby he appointed his wife (who died in June, 1844), William Brittain, and John Weaver the younger (the latter of whom is since dead), executors and universal legatees in trust, and gave the residue of his property to his wife and daughter, or the survivor. On the 11th July, 1842, he re-executed his will, the original date being altered, the legacies bequeathed thereby to a legatee having been previously struck through with a pen, and a further clause of attestation written in the margin of the last page. Mr. Wood, having executed a will in 1837, prior to the Statute, re-executed it in 1842, and in October, 1848, executed a further will, whereby the former will was virtually revoked. In December, 1848, he wrote and executed a codicil, which declared the first will null and void, and that

the drawer of the will, is also an attesting witness to this re-execution ; but he died in September, 1845. On the 8th October, 1848, the testator executed a further will, prepared by J. T. Middleton, a solicitor (one of the attesting witnesses), in whose possession it remained from the time of the execution until after the testator's death, whereby he appointed J. W. sole executor and residuary legatee in trust, and, after giving £50 to his own daughter, bequeathed the residue to his brother and sister, thereby virtually revoking his former will. On the 22nd December, 1848, the testator, with his own hand, wrote and duly executed a codicil, to the following effect: "I, John Harper, &c., do declare that a will made by and in the possession of Mr. Middleton, solicitor (about two months since), is null and void, and that no will of my property is in existence which I allow to be valid except that made by the late Mr. C. B. Wood, in which Mr. Weaver, of &c., and Mr. Britain, of &c., are executors." The testator, at the time of executing this codicil, stated to one of the attesting witnesses that his intention in making the codicil was to revoke the will made for him, in the October preceding, by Mr. Middleton, and of reviving that made for him by Mr. Wood. He left no other will or codicil.

Dr. Howard moved for administration (the surviving executor and universal legatee in trust having renounced), with the will of 1837, as re-executed, and the codicil of October, 1848, annexed, to the daughter and beneficial universal legatee.

SIR H. JENNER FUST.

The question is, not whether the will of October, 1848, is revoked, but whether the will of 1837, or rather of 1842, is revived ; because that had been revoked, and, under the existing law, an instrument, once revoked, can be revived only by re-execution, "or by a codicil showing an intention to revive the same." Now there can be no doubt of the intention of the deceased, in executing the codicil of 1848, to revive the will of 1842, for he expressly declares that no will of his shall be valid except that of 1842, and

MAY 5.

Harper, dec.

the only valid will was that of 1848 :—Held, that the codicil revived the will of 1837 in its altered state.

MAY 6. that the will of 1848 is null and void. I have no doubt, therefore, on the face of the codicil, that it revives the will of 1842, in its altered state.

Harper, dec.

Motion granted.

Toller, Proctor.

Consistory Court of Oxford.

MAY 14.

FACULTY, for the removal of a chapel to another site, opposed on the general ground, *inter alia*, of want of jurisdiction in the Spiritual Court, — granted upon conditions. — **CLAYTON AND OTHERS v. DEAN AND OTHERS.**—This was a question respecting the grant of a Faculty for the removal of a chapel to another site, within the limits of the chapelry. The facts are fully and clearly stated in the judgment of the learned Chancellor.

DR. PHILLIMORE.

This is a proceeding instituted on the part of the Rev. E. B. Dean, vicar of the parish of Lewknor, the churchwardens, and the majority of the parishioners and inhabitants of the same parish, assembled in vestry, for the purpose of obtaining a Faculty for the removal of a chapel from Ackampstead to Cadmore End, both places being situated within the district of the chapelry, which chapelry is a component part of the parish of Lewknor. The issue of this Faculty is opposed by two landed proprietors in the hamlet of Ackampstead, namely, Sir Wm. Clayton and Mr. Townsend (neither of whom, I believe, is resident therein), by two owners of cottages, and thirteen resident inhabitants, of whom eight are marksmen.

JUDGMENT.

Fortunately, either from the indisposition of the inhabitants of this diocese to litigation, or perhaps from some less satisfactory reason, we have little experience of contested

suits in this Court; and such is the dearth of practitioners here, that various informalities have found their way into the pleadings, and the cause has not been so fully instructed with evidence as it would have been in any other Ecclesiastical Court. These anomalies have led to inconveniences; they are not, however, I trust, sufficiently grave to impede the course of substantial justice.

MAY 14.

*Clayton v.
Dean.*

The facts of the case are these :—The benefice of Lewknor, in the patronage of All Souls College, is divided into Lewknor-down-hill and Lewknor-up-hill. The parish church is situated in the flat country of Oxfordshire, in the lower district, whilst the upper part of the parish lies in the centre of the Chiltern range of hills, so that a population, scattered over a very extensive district, has no other means of attending Divine Service than by resorting either to the parish church of Lewknor, which is five or six miles distant, or to the chapel of Ackampstead, which is situated in the extremity of the parish, and on the very confines of the parish of Hambleden.

By the Deed of Endowment of the Vicarage of Lewknor, dated in 1412 (which, together with the Terrier, was first produced at the hearing of the cause), the Incumbent was to have all the tithes, great and small, of Ackampstead, and he was to have a Chaplain, who was to be resident with him, and the Vicar or this Chaplain was to perform Divine Service in the parish of Ackampstead every Sunday. In the Terrier, which is dated in 1685, it is recited that there are belonging to the chapel all the tithes, great and small, of Ackampstead; the tithes, great and small, of Fennimore, and the small tithes of Cadmore End.

Lapse of time has brought with it its usual changes. Cadmore End, which at the date of the Endowment was a desolate and scarcely inhabited district, in the middle of the woods which covered the face of the Chiltern Hills, has become comparatively populous, while the population of Ackampstead has diminished; and, from circumstances which it is unnecessary here to detail, the Ecclesiastical authorities of the diocese concur in opinion that the spiritual instruction of the parish may be greatly promoted and

MAY 14.

*Clayton v.
Dean.*

improved by a transfer of the chapel from Ackampstead to Cadmore End.

Under this state of facts, I now turn to the nature and character of the opposition which is offered to the proposed arrangement.

Objections to
the Faculty.

The objections, as set forth in their plea, are twofold, and rest on distinct and separate grounds. First, that I have no power to grant the Faculty; secondly, that, if I had such a power, it would be unfitting and inexpedient that I should exercise it, under the circumstances of the case.

I propose to deal with these objections in the order in which they are stated, not only because the first is their main objection, but because, if they succeed in substantiating it, an estoppel would be put to all further investigation on my part.

The averment is thus set forth in their pleadings: "It is, however, on the strict ground of want of legal power to effect the alteration attempted, that we must be understood distinctly and emphatically to rest our opposition." It is true that, in the course of the Argument on the last Court-day, the learned Counsel who appeared for the opponents descended from this high ground, and admitted that, under very extraordinary circumstances, and differing from any which appeared in this case, the Court might possibly exercise such a power; but still his argument was carried to the full extent on the ground of illegality, and it becomes essential that I should examine the reasoning by which it has been attempted to support the extreme as well as the more limited proposition; inasmuch as of late years cases of this description have not been of frequent occurrence.

The authorities set out and relied upon in their written statements are Burn's *Ecclesiastical Law* and Hook's *Church Dictionary*. The citation from Burn has only reference to the power of the parishioners to make a rate for the repair and rebuilding of the parish church, and has no allusion, direct or indirect, to the question raised in these proceedings. There is no specific passage adduced from Hook; his authority is invoked generally; but in the course of my experience (now a pretty long one in the Ecclesiastical

Courts) I never remember to have heard any reference to that work. A third authority relied upon in the pleading is the negative evidence, arising from one of the Church Building Acts (8 & 9 Vict. c. 70), which vests the power of the removal of a church in the Church Commissioners alone, and is silent as to any mention of the Bishop.

In the first place, the Church Building Acts are not precisely the fountains from which we should expect to derive sound principles of Ecclesiastical Law, as they unfortunately pass current for remarkable instances of clumsy and inaccurate legislation; and secondly, it is not by loose and feeble analogies, deduced from the consideration of these Statutes, that a power inherent in the Ecclesiastical jurisdiction, if it ever existed, could be set aside. And here I cannot help observing that it is to be regretted that, out of inadvertence, or from excess of caution, superfluous and unnecessary provisions have sometimes been introduced into modern Acts of Parliament, which may have the effect of creating doubt and ambiguity as to ancient and acknowledged principles of law.

But to return to the case. To these authorities the learned Counsel for the opponents added, and greatly relied upon, the case of *St. Mary Magdalen Bermondsey Church*.* The utmost extent of the authority of this case (as I understand it) is, that if a church be so ruinous that it cannot be repaired, a Vestry, legally convened, may make a rate for pulling it down and rebuilding it on the same foundation. No one, at this time of day, can doubt that such a power as was exercised in this instance is vested in the parishioners; but what is there in the four corners of the report of this case to show that if, in addition to making a rate, the parishioners had obtained a License or Faculty from a Court of competent jurisdiction to remove the church to another site, they might not have legally proceeded to do so? I must observe, besides, that we are here dealing with a chapel, and not with the parish church, to which it is possible that different legal considerations might apply.

MAY 14.

Clayton v.
Dean.

* 2 Mod. 132.

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 Clayton v.
 Dean.

Such is the sum and substance of the authorities cited in writing as well as in argument by the opposers of the Faculty, and the deliberate investigation of them leads me to the inevitable conclusion that they fall infinitely short of the proposition they have been brought forward to maintain, namely, the absence of any power in the Spiritual Court to decree the removal of a chapel from an inconvenient to a convenient site within the limits of the chapelry.

I now turn to the authorities on the other side, observing by the way that, if there is no law, statute, or decision, which prohibits the act; if no question of temporal jurisdiction is mixed up with it, and if on the face of the matter it is merely a question of Ecclesiastical cognizance, the law has vested in this Court alone power and authority to decide the point at issue.

We find in Gibson* the copy of a Faculty purporting to have been granted by the Bishop of London, in 1400, "*pro translatione Ecclesiæ Parochialis ad alium locum.*" The reasons for the removal are set forth, namely, its vicinity to the public road having rendered it liable to the depredations of robbers, &c., and it proceeds: "*Nos, igitur, attendentes petitionem et supplicationem vestras hujusmodi fore justas et consonas rationi ad transferendam Ecclesiam vestram antiquam ad et in locum ubi de licentiâ nostrâ nova Capella infra fines et limites dictæ Parochiæ jam edificata existit, et ibidem de novo Ecclesiam construendam et edificandam ex petris seu lapidibus, sicut decet, reservatâ nobis Facultate ponendi ibidem primum lapidem, licentiam concedimus specialem:*" and it further provides that the old church-yard, "*Ecclesiâ dirutâ et evulsâ, tanquam locus sacer conservetur.*" And in Oughton† there is the copy of a Faculty purporting to have been granted by the Archbishop of York, in 1577, "*ad diruendam Capellam, et construendam in alio loco.*" The chapel of Awburn, it seems, had been in danger from the incursions of the sea, and the permission given by the instrument was "*eandem vestram Capellam de Awburn penitus demoliri et diruere, ac deinde materiam dictæ Capellæ*

* 2 Cod. 1458.

† 2 Ordo Jud. 323.

sic demolitæ et dirutæ, ad et in quandam fundi sitam, ad hoc specialiter et legitime destinatam transferre et de hujusmodi materiâ antiquâ dictæ Capellæ pertinente, ac de novâ sufficiente ipsam Capellam de Anoburn de novo ibidem erigere et reedificare (præstitâ per vos cautione sufficiente ad præmissa perimplendum)."

Perhaps it might be difficult at this distance of time to ascertain whether the two Faculties to which I have just referred were carried into practical effect; the probabilities that they were preponderate; but whether this may have been so or not, handed down to us as they are, and preserved in books which are regarded as the oracles of our practice, they are valuable as forming strong presumptive evidence of the practice, and consequently of the law, of the Ecclesiastical Courts, and of the power inherent in the spiritual jurisdiction, deduced from remote antiquity, of granting Faculties for the removal of Ecclesiastical edifices.

I have to regret that this case has not been furnished with some precedents of this description, inasmuch as I entertain little doubt but that, if diligent search had been made into the Muniments deposited in the Registries of the various Ecclesiastical Courts, many instances would have been found of the issue of such Faculties. Since this case was argued, I have not had sufficient leisure or opportunity for instituting any diligent search; but it appears from information upon which I can rely, that, in the interval between 1777 and 1834, at least three Faculties were granted by the diocesan Court of Salisbury for removing churches or chapels to a different site. It is to be observed, however, that the Mortmain Acts, and especially the very stringent Statute of Lord Hardwicke, which passed in 1736, created difficulties in procuring sites for churches which might be sufficiently secure to justify Bishops in consecrating them; and it was not until the 43 Geo. 3, c. 106 (in 1803), amended afterwards by the 51 Geo. 3, c. 115, both which Statutes preceded all the Church Building Acts, that a specific power was given for alienating land for any such purpose, "without any License or Writ of *Ad quod damnum*, the Sta-

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tute of Mortmain, or any other Statute or law to the contrary, notwithstanding."

In *Steeven v. St. Martin's Orgers*,* Sir C. Robinson granted a Faculty to the churchwardens of the parish to take down a church within the parish which had fallen into a ruinous state of dilapidation, on the sole condition that the vaults beneath the church should be preserved so as to still form part of the burial-place of the inhabitants of the parish. In *Warner v. Gater*,† the validity of a church-rate made for the purpose of repaying the expenses of the consecration of a newly-built church was contested on the ground of the parishioners having pulled down their own church, and rebuilt it on another site, without having obtained any License or Faculty for so doing from the Ecclesiastical Court. There were several arguments on the point, and the difficulty was at last surmounted on the suggestion of the Judge, that the case might be brought by an amended plea within the range of one of the Church Building Acts; which was accordingly done. So in the case of *Hamilton v. the Parish of Loughton*,‡ Dr. Lushington, as Chancellor of the Diocese of London, granted a Faculty to the Rector and churchwardens of the parish of Loughton for taking down the ancient parish church of St. Nicholas and appropriating the materials, with the furniture and fittings, or the proceeds of their sale, towards the erecting, fitting up, and completing the new parish church of St. John the Baptist in the said parish, in pursuance of the resolution of a meeting of the parishioners in vestry.

It seems, moreover, to me that the Statutes of 43 Geo. 3, c. 106, and 51 Geo. 3, c. 115, to which I have already alluded, must be considered as being enacted on the assumption that there exists a power in the Ordinary to direct the removal of a church; for they provide (the former having regard to subjects, the latter to the Crown) that it shall be lawful to convey a certain portion of land for the purpose of rebuilding on it,—that is, on ground previously unconsecrated, and therefore a new site,—a church or chapel, "the

* 2 Add. 259.

† 2 Curt. 316.

‡ 5 Notes of Ca. 192.

consent and approbation of the Ordinary being first obtained." Now if it was unlawful for the Ordinary to authorize the rebuilding of a church on a new site, the power given by the Statute to legalize the conveyance of ground for this express purpose would be nugatory.

I intrench myself within these authorities; but, independently of them, I cannot understand why, on reason and principle, I should not be possessed of jurisdiction over the subject-matter of this suit, and be invested with a power to grant a Faculty here when I have indisputably a power to grant one with respect to any other matter connected with the fabric of the church: I say on reason and principle.

The law being in my judgment clear, the only remaining question is the expediency of consenting to or withholding this grant. The law clear.

The first thing I have to consider in this branch of the inquiry is, what will be most beneficial for the general interests of the parish. The voice of the parish, as attested by its accredited organ, the majority of the parishioners assembled in vestry, is distinctly in favour of the proposed removal of the chapel; for I must consider that, in all cases where the parish is competent to act by its own power, it is the majority of the vestry which must bind the whole, as far as the expression of the voice of the parish is concerned. Undoubtedly the vote of that majority is not conclusive on the judgment of this Court; indeed, I can foresee many cases in which the Court might be called upon to decide against it; still it would be with reluctance, and it is, as it always must be, in cases of this description, entitled to very considerable weight. Expediency.

Another circumstance in favour of the projected removal is, that it is to be accomplished by voluntary subscription, and without any rate or levy of a pecuniary character being imposed upon any of the inhabitants.

I look next to the relative population of the two hamlets. Mr. Townsend calculates the actual number of souls in the Ackampstead district to be 58; these, it should seem, inhabit three farm-houses and nine cottages; whereas Mr. Wroughton states the population at Cadmore End at the

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present time to be 114 souls, dwelling in five farm-houses, one public-house, and fourteen cottages. Giving credit, as I entirely do, to both these gentlemen for the accuracy of their respective statements, the population of Cadmore End is nearly double that of Ackampstead. It further appears from the affidavit of Mr. Meazies, that the congregation attending divine service at Ackampstead Church, during the several years he has officiated as minister in it, has consisted upon an average of eighty persons, of whom fifty belong to and reside within the parish of Hambleden, and not more than twenty at the utmost have belonged to the parish of Lewknor.

Nor would it be just that I should entirely withhold from my consideration that, unless this chapel should be removed, there is no church or chapel within the distance of more than two miles which can be resorted to by the inhabitants of Cadmore End; whereas if effect should be given to the scheme of the Diocesan for the increase and propagation of religious instruction throughout this district and its immediate vicinity, the chapel which is actually erected at Frieth, and which will be consecrated (according to notice publicly given) within the course of three weeks, will be within a very easy distance for all the resident population of Ackampstead.

While I am treating on the expediency of the removal, another consideration operates powerfully on my mind, namely, the opinion which has been so unequivocally expressed by the Bishop on this branch of the case. On this point I am anxious not to be misunderstood: for, although the Judge of this Court is as independent of the Bishop as any Judge of the Court of Queen's Bench can be of the Crown; although the Bishop has no power (as was erroneously asserted in Argument) of personally interfering with any decision of mine; still, when the point to be considered is not one of law, or of any fact to be elicited from conflicting evidence, but simply one which hinges on the arrangement by which the spiritual interests of the parish may be best consulted; surely the opinion of the Diocesan,—who (to borrow an expression of Lord Stowell's) “has the gene-

ral *cura animarum* throughout his whole diocese,"—ought to be looked up to with attention and respect, and to incline the balance, even were the scales otherwise equally poised, in favour of the measure, which is especially calculated in his judgment to promote the spiritual advantage of parochial districts confided to his pastoral superintendence.

This is the conclusion at which I have arrived from the best consideration I have been able to apply, as well to the law and practice of the Court, as to the facts with which the suit is instructed, bearing throughout in mind the *dictum* of the learned Ayliffe, "that the granting of a License or Faculty is not dispensing with the law, but an execution and observance thereof."

I shall grant the Faculty, but *præstid sufficiente cautione*; for I shall expect a bond for £800 to be given by the parties applying for the Faculty, with sureties for the performance of the rebuilding of the chapel, and for the payment of all expenses attending the same, and I shall direct a clause to be inserted, that this is to be done without any rate or assessment on the parish. There must also be inserted another clause, to protect the site of the old church from desecration; such a clause will be in the spirit of the older Faculties, to which I have referred, that the site, "*Ecclesiâ dirutâ et evulsâ, tanquam locus sacer conservetur.*"

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Faculty granted:
conditions.

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MAY 15.

Add. Court Day.

THE "FAME" (CLAY).—*Motion*.—This was a cause of Practice.—*Pleading*.—In damage, commenced by Act on Petition. After the Act had been given in by the promovents, the Proctor for the party proceeded against now applied, to the Court to be given in by the

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Fame.
promovents, they were directed, on the application of the defendants, to alter the form of proceeding, and to bring in a Libel, on payment, by the defendants, of the expense incurred by the Act

DR. LUSHINGTON, after some hesitation, and observing that, in such cases, application should be made as early as possible, granted the prayer of the Proctor for the defendants, on condition that he undertook to pay to the other party the expense they had incurred by the Act on Petition.

Proctors:—*Jenner*, for the promovents; *Glennie*, for the defendants.

Consistory Court of London.

4th Sess.

MAY 15.

Practice. — **HALL v. HALL.**—*Libel.*—This was a suit for a divorce by reason of adultery by the wife against the husband. The marriage, which was clandestine, took place on the 11th of September, 1848, and the parties never cohabited together. The adultery was alleged to have taken place with a woman with whom Mr. Hall was intimate prior to his marriage. There being no appearance on the part of the husband, the proceedings were carried on *in pœnam*.
Pleading — In a suit for divorce by reason of adultery by the wife against the husband *in pœnam*, a plea of non consummation excluded.—It is sufficient in such a case to plead non-cohabitation.

Dr. Addams, for the wife, moved the admission of the Libel.

JUDGMENT.

DR. LUSHINGTON.

You plead that the marriage was never consummated. I do not know that this has ever been pleaded in a case of adultery: this is not a case of nullity of marriage. I do not know whether the other party would take issue upon this point or not; but, if he did, the difficulty of proof would be great, and the question is whether it is not suffi-

cient to plead that the parties never cohabited together,—
never lived together as husband and wife. That would not
bring in issue the question of consummation.

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Hall v. Hall.

Addams consented to reform the Libel in that particular,
and it was admitted.

(The Court pronounced for the divorce.)

July 11.

Pownall, Proctor for the wife.

END OF EASTER TERM, AND OF THE SITTINGS
AFTER TERM.

TRINITY TERM, 1849.

Prerogative Court of Canterbury.

1st Sess.

MAY 26.

Practice. — **QUAIT AND SNOWDEN v. MANBY.**—*Motion.*—This was a business of granting probate of the will of James Snowden, dated 29th April, 1848, promoted by Emery Alexander Quait and James Snowden, two of the executors therein named, against William Edward Manby, one of the executors named in a will of prior date. The will was propounded in a *Conditit*; the evidence of the two attesting witnesses was taken upon it, and publication passed, when it appeared that the witnesses were unable to speak to the handwriting of an Exhibit annexed to the Interrogatories, purporting to be a letter from James Snowden, one of the parties propounding the will.

Motion.

Dr. Harding, on behalf of the executor opposing the will, moved the Court to rescind the conclusion of the cause, in order to allow him to plead the Exhibit to be in the handwriting of James Snowden.

Dr. Addams opposed the Motion.—The letter is immaterial in the cause; the will is proved beyond all doubt.

JUDGMENT.**SIR H. JENNER FUST.**

Supposing there was no reason to believe that the witnesses would not have proved the handwriting, the adverse party has been taken by surprise. Whether the letter is important or not, I cannot say, as I have not seen the evidence; but if it is pleaded, the other party must either admit or deny it, and if they deny it, evidence must be gone into to prove it, and the party causing the expense will have to pay it. There is an objection to pleading after

publication ; but the cause is never concluded to the judge. It can be no inconvenience to the other party, and the Court is unwilling to shut out written testimony. I am of opinion that I am bound to accede to the Motion, and to rescind the conclusion of the cause simply for the purpose of enabling the party to plead the Exhibit as of the handwriting of the other party in the cause, and if he puts the party to the expense of proof, he must take the consequences.

MAY 26.

*Quait v. Manby.*Motion
granted.

(The letter was accordingly pleaded in an Allegation, the facts of which were admitted by the adverse Proctor in Acts of Court, and ultimately the validity of the will propounded, which was not disputed at the hearing, was pronounced for.)

Proctors :—*Crosse*, for the parties propounding the will ; *Stokes*, for the party opposing.

IN THE GOODS OF REBECCA HAND, SPINSTER, DEC.—*A testatrix, Motion, ex-parte.*—The deceased died 2nd March, 1849, having made and duly executed her will, with a schedule and codicil (or two codicils), both without date, but executed at the same time as the will. The property consisted of £24 in ready money, £571 Three and a Quarter per Cents, certain household furniture, and a small sum due to her on account of an annuity. By the will, after some pecuniary bequests, she purported to dispose of the residue in these terms : “ And the remainder of my money, after payment of my debts, funeral expenses, and legacies, I give and bequeath to my three nieces and nephew, namely, C. M. P., S. B., wife of J. B., daughter of my late sister S. P., and C. B. and F. J. B., daughter and son of my late sister C. B. ; but in the event of either my nieces or nephew dying before my decease, then I wish that his or her share should be equally divided between my said three nieces and nephew, namely, C. M. P., S. B., C. B. and F. J. B., except the share that would fall to my said niece S. B., in case my said niece, S. B., should die before me, her share to be equally divided between her children.” After this, she gave certain other pecuniary and some specific legacies, and by the

A testatrix, dying possessed of money, stock, and furniture, by her will, bequeathed the residue as “ the remainder of my money : ” — Held, that the parties named in such residuary clause were entitled to administration, with the will annexed, as residuary legatees, on the consent of the next of kin.

MAY 26.

Hand, dec.

second codicil she gave some directions as to her funeral and rewards to persons who attended her in her illness, and two further pecuniary legacies. The deceased left surviving E. N., widow, her sister, only next of kin, and the aforesaid nieces and nephew. The question was, whether the recited clause in the will would, under the words "remainder of my money," make the parties named therein residuary legatees.

May 12.
MOTION.

Dr. Addams moved for administration with the will and codicils annexed to C. M. P., the niece, one of the residuary legatees, the sole executor named in the will having died in the lifetime of the deceased; citing *Jarman, On Wills*.*

SIR H. JENNER FUST.

It is difficult to dispose of this question upon *ex-parte* Motion, in the absence of the sister; and there is no *constat* of what the property consisted. I have, however, very little doubt, upon looking at the cases of *Dawson v. Gaskoin*† and *Glendening v. Glendening*;‡ and Mr. Justice Williams, *On Executors*,§ says that the result of all the cases is, that, although a simple bequest of "money" will not of itself pass stock, "yet the word 'money' may be so used in a will as from the whole context to show that the testator meant it to pass stock and other personal estate." He refers to three cases; in one of them (*Glendening v. Glendening*), a testator had bequeathed to his wife the interest of his money and the use of his goods for life, and at her death, he gave certain legacies, and the remainder of his property to his brothers and sisters; at his death, the principal part of his property consisted of money in the Funds, and it was held by Lord Langdale, that the widow was entitled to the residue for life. So that I should have no doubt, if the sister was before the Court; but I cannot make this Decree in the absence of the sister; she must consent. That case in *Beavan* is very strong.

May 26.

On a proxy of consent from the sister,

* Vol. I., p. 702.

† 2 Keen, 148.

‡ 9 Beav. 324.

§ P. III., b. III., c. 2, § 4, p. 1025.

PER CURIAM.

I am satisfied now. Decree administration to the residuary legatee.

Pulley, Proctor.

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DECEDE.

High Court of Admiralty.

JUNE 12.

3rd Seas.

THE "JOHN" (HAY).—*Act on Petition.*—This was a proceeding by the holder of a bottomry-bond for £4,400 against the ship, cargo, and freight, the value of which was insufficient to satisfy the bond. The validity of the bond was not disputed. The ship was sold under a decree of the Court, and the owners or consignees of the cargo brought into the Registry £1,199. 2s. 6d., as the proceeds of its sale, and £566. 16s. 7d., which they alleged to be the balance of freight, a sum of £308. 5s. 3d. having been already paid to the master, on account of such freight, prior to the date and execution of the bond. The bondholder objected to this deduction, and alleged, in his Act,

That on the 12th December, 1846, the owner of the *John*, then lying in the port of London, by a Charter-Party, agreed with Messrs. A. Gibbs and Sons, of London, that the vessel, after completing her intended voyage to Launceston, Van Diemen's Land, should proceed thence to Valparaiso, Chili, there to receive orders from Messrs. Gibbs, Crawley, and Co., for loading a cargo, with which to return to Falmouth: That, by the Charter-Party, it was stipulated that the master was to be supplied in the Pacific with a sum not exceeding £200, free of commission, which was to be deducted from the freight, together with the cost of insurance on such advance, and that the captain's receipt was to be considered binding upon the owner: That it was further stipulated that, if the Charterers or their agents should think fit to advance any further sum on the credit of the freight for repairs, stores, and disburse-

Bottomry.—The master of a vessel, hired under a Charter-Party,—which stipulated that he was to be supplied by the charterers with a certain sum, to be deducted from the freight, and that, should they think fit to advance any further sums on the credit of the freight, for repairs, &c., such sums were to be considered in part payment of freight to the master,—after receiving such advances, executed a bottomry - bond, hypothecating ship, cargo, and freight: the bond being sued upon in this Court, the consignees of the cargo brought in the balance

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of freight, after deducting the sums so advanced to the master, the bondholder requiring the whole freight to be brought in: — Held, that the advances were not loans, on the credit of the freight, but payments of the freight itself, which the consignees were therefore entitled to deduct. — Wherever freight has been *bond fide* advanced anterior to a bottomry-bond, the bond does not attach to that freight.

ments, such sums, with interest and commission, were to be considered in part payment of freight to the master, and that the captain's receipt for such payment was to be binding upon the owner: That the vessel arrived at Valparaiso from Launceston on the 24th December, 1847, and whilst there, on the 15th January, 1848, Gibbs and Co. advanced the master £280. 1s. 3d., and ordered the vessel to proceed to Lima, where she took in cargo, Gibbs and Co. having, in February, 1848, assigned their Charter to Myers and Co.: That whilst the *John* remained at Lima, the agents of Myers and Co., on the 12th April, 1848, advanced to the master a further sum of £28. 4s.: That, on the 20th April, the vessel sailed from Lima to London, but, experiencing bad weather and receiving damage, put into Valparaiso in a leaky state, and underwent very extensive repairs: That, whilst at Valparaiso, the master was necessitated to take up on bottomry funds for repairing, supplying, and refitting the ship, and accordingly borrowed on the ship, cargo, and freight, 15,500 dollars: That neither the £280. 1s. 3d. advanced by Gibbs and Co. at Valparaiso, nor the £28. 4s. taken up at Lima, prior to the date of the bond, should be deducted from the freight hypothecated, inasmuch as no mention of such deduction is made in the bond: That, at the time the £280. 1s. 3d. was so advanced, the cargo had not been placed on board the *John*, and therefore such advance could not have been made on account of freight, and that, if either of the sums could be legally deducted from the freight, the value of the cargo, as so increased thereby, ought to be made available to answer the bottomry-bond; wherefore, he prayed that the owners be assigned to pay into Court the £308. 5s. 3d., balance of the freight.

The Answer, on the part of the owners or consignees of the cargo, alleged that, on the advance of the money by Gibbs and Co. to the master, the latter gave a receipt for the same, wherein it was expressly stated that it was for the necessary disbursements of the ship, "to be deducted from the freight accruing to the vessel on her Charter-Party, dated at London, 12th December, 1846;" and that he gave a similar receipt on the advance of the £28. 4s. (the receipts being annexed); that both such advances on account of freight were made long prior to the execution of the bond; and that, under the terms of the Charter-Party, the sum of £566. 16s. 7d. was the whole amount now due from them on account of freight.

Drs. Jenner and Bayford, for the bondholder.—If these advances could be protected by the clause in the Charter-Party, it might have extended to the whole freight, and if this principle be adopted, it will throw a new risk upon lenders on bottomry. The master was the agent of the consignees of the cargo, and, having given the lender no notice of the payments he had received, he did in effect commit a fraud upon the party from whom he borrowed the money, who had no means of knowing the diminution of the amount of the freight, one of his securities.

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ARGUMENT.

Drs. Robinson and Twiss, for the consignees of the cargo.—“By the general policy of the law of England,” Lord Ellenborough says, “freight does not become due until the voyage has been performed; but it is competent to parties, by Charter-Party, to covenant by express stipulation in such manner as to control the general operation of the law.” *De Silvale v. Kendall*.* In the present case, the Charter-Party bound the charterers to advance £200 to the master, by way of pre-payment of the home freight, and gave them the option of advancing a further sum. It was no loan or advance on the security of the freight, but a part of the freight itself, so much of which has therefore been already paid. *Saunders v. Drew*.† *The “Constantia Harlessen.”*‡

DR. LUSHINGTON.

The facts of this case are not subject to any dispute. It appears that this vessel having come to the port of Valparaiso under a Charter-Party, a bottomry-bond was given there, and that the amount of the value of ship, cargo, and freight, is insufficient to satisfy that bond. It appears further, that two sums of money were advanced to the master prior to the date of this bond; the first on the 15th January, 1848, of £280. 1s. 3d.; the second on the 12th April, 1848, of £28. 4s., making together £308. 5s. 3d. The question which the Court has to decide is between the holder of the bottomry-bond and the owners of the cargo. The

JUDGMENT.

* 4 Maule & S. 37.

† 3 B. & Ad. 450.

‡ Edw. 234.

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latter have brought in a certain sum on account of freight, and which they say is the whole of the amount due for freight: on the other hand, the bottomry bondholder contends that no freight whatsoever has been paid, and that anything done at Valparaiso or in the South Seas does not in any degree affect him. This is a question of some nicety, and I should take time to deliberate on the decision to which I should come, unless I had so satisfied my mind as to the ultimate conclusion to which I ought to arrive, that it would be mere waste of time to delay pronouncing a decree.

I apprehend, in the first place, it is clear that, when a bottomry-bond is granted on ship, freight, and cargo, the bond can only attach upon that which properly comes under the name of one or the other; that it cannot affect anything *bond fide* done before with reference to the freight, though it might be a very erroneous proceeding on the part of a master not to inform the lender of the money on bottomry that the freight had been actually paid, for such might be the case: though it might savour of fraud to keep back such a circumstance, yet even that, I apprehend, would not affect a case of this description, coming before this Court. With regard to the advance of freight, I entertain no doubt whatever, that, wherever freight has been *bond fide* advanced anterior to the period when a bottomry-bond is taken, the bond does not attach on that freight; and I take it there have been cases almost without number in which, by a compact between the parties, the owner of a ship has received freight when no goods have been taken on board, when none were intended to be taken on board in the outward voyage, and at a period when by no possibility, in any sense of the term, could freight be said to be due. I dismiss from my mind entirely all argument as to the freight not being due by reason that the cargo was not laden, because it does not appear to me to create any distinction deserving of consideration. I will take the case, in the first instance, to simplify the matter, of a vessel sailing from Liverpool to Valparaiso, to bring back a cargo. Suppose the owner of the vessel, being in want of money, consents to charter his

A bond does
not attach on
freight prepaid.

vessel with an agreement that he shall have a lump sum paid down, perhaps less than the real amount of freight would be, if he waited until the freight was earned. I apprehend, in that case, if he has received the money, that is a payment of freight to all intents and purposes, and the freight so received by the owner never can be the subject of bottomry. That brings me to this question: whether the circumstances of this case assimilate it to the one I have just stated; that is, in other words, whether this was simply an advance of money on loan, or was in reality a payment beforehand of freight due. Several cases have been cited which establish this proposition, that where an actual advance of freight has been made in pursuance of a Charter-Party, those who advance it, whatever may happen to the ship, never can recover the money so advanced. Respecting that principle I entertain no doubt whatever. Indeed, the decision to which Dr. Robinson referred (*De Silvale v. Kendall*) is one of the highest authority. It was decided by four judges of the Court of Queen's Bench, and it would be very difficult to find four judges more remarkable for their knowledge of mercantile law than those who decided that case, namely, Lord Ellenborough, Mr. Justice Le Blanc, Mr. Justice Bayley, and Mr. Justice Dampier. That case is the highest authority, and I believe that authority has been unquestioned to the present day; that it is unquestionable, and that it contains the true principle applicable to this case.

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In my view of this case, the question turns upon the construction of the Charter-Party itself. In construing a Charter-Party, the principle which must govern the mind of the Court is, to endeavour, as far as possible, to ascertain what was the true meaning of the parties, and to give effect to that meaning, provided they have expressed themselves in terms sufficiently definite to be understood. A Charter-Party is certainly an instrument of some formality; at the same time, it is not an instrument settled by Counsel, like a deed, which requires the same degree of minute precision as would be expected in an instrument so settled. The Charter-Party, after having stated, in the first instance, a

Construction
of the Charter-
Party.

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variety of particulars always set forth in documents of this kind, and having specified what is to be the freight of the homeward-bound cargo, proceeds in these words: "The master to be supplied in the Pacific with a sum not exceeding £200, free of interest and commission, which is to be deducted from the freight at the exchange of 48d. per dollar, together with the cost of insurance on such advance, the captain's receipt to be considered binding on the owner." The first payment (£280) was advanced, as I understand the facts, under this first clause of the Charter-Party. Then comes the following clause: "And should the charterers or their agents think fit to advance any further sum on the credit of the freight, for repairs, stores, and disbursements, such sums, with interest and commission, to be considered in part payment of freight to the master, the captain's receipt for which is to be binding on the owners." The first question will be, whether there is any distinction to be made between the advance of £200, though the actual advance was £280. 1s. 3d. in the first instance, and the advance of all over the £200. Upon reading this clause, and giving it the utmost attention in my power, I conceive I am bound to consider every part of this clause, and not to divide it into two separate portions. I am sure I should not do justice to the proper principle of construction to be applied to a Charter-Party if I were not to take into consideration the whole of what is here stated by way of stipulation, and endeavour to extract from it the true meaning of the parties.

In the first place, the master is to be supplied with a sum not exceeding £200; and that the charterers are bound to do; they have no option, no choice, without violating the agreement by which they have voluntarily bound themselves. It is to be free of interest and commission, which is to be deducted from the freight—that is to say, the £200 so advanced is to be deducted from the freight. Now what I shall have to consider is, was this to be considered as a loan of £200, free of interest and commission, to be deducted from the freight in account; or was it to be considered as an advance of part of the freight itself? The only

other words in that clause that are of any importance are, "The captain's receipt for which is to be binding on the owners." It is, perhaps, possible that some little doubt might have arisen as to the construction of this clause, and it might have been deemed, in the opinion of some, that this was an advance (construing the words very strictly), not of freight, but of money, to be deducted from the freight afterwards; whereas the other construction would be, that the intention of the parties was, notwithstanding the mode in which it is expressed, that it was really and substantially to be an advance of the freight itself. If there be any doubt on this point, of course I should look at the rest of the instrument, to solve that doubt. The instrument runs on, "And should the charterers or their agents think fit to *advance* any further sum"—the word "advance" being subject to some degree of doubt, because you may advance part of the freight, or advance money—"on the credit of the freight,"—which would look more like a loan—"for repairs, stores, and disbursements, such sums, with interest and commission, to be considered in part payment of freight to the master; the captain's receipt for which is to be binding on the owners." I cannot entertain a doubt as to the meaning, from the last clause, that it was not an advance on loan on the credit of the freight, but part of the freight itself. Were I to apply this latter clause simply and solely to the advance made over and above the £200, I could entertain no doubt in my own mind that, so far as relates to the clause, the £200 was an advance of the freight itself, and not an advance simply upon the credit of the freight. But is there really any true distinction to be found between the two sums? Could it be the intention of the parties that the master was to be entitled as a matter of right to the £200, which was to be merely a loan of money? and could it be intended that, where it was optional for the charterers or their agents to advance or not, in that case it should be a payment of the freight itself? I cannot with any safety take such a distinction. I think I am bound to look at the whole of this section, and see whether it does not in substance mean that a part of the freight is to be advanced, and

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John.

Part of the
freight itself ad-
vanced.

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not a loan upon it. The words "free of interest and commission" have been commented upon. They do not, I confess, in my mind, create any very strong impression one way or the other, for I think the reason for inserting them was this: "The master will want money for disbursements; we will make up our mind to advance to him what will be about the probable sum he will require, namely, about £200; we, the owners of the cargo, are content to pay that sum, and not to charge interest or commission; we have considered that in making the Charter-Party;" but with respect to all further sums, the extent of which was optional and to be determined by the discretion of the agents, and which might come to a considerable amount, remembering the distance at which the transaction took place and the advance being for repairs, stores, and disbursements, the charterers considered they were entitled, and fairly entitled, to charge interest and commission. I think that is the true distinction between the advances of these two sums; and I think, therefore, the agreement was, that part of the freight should be advanced in the first instance; and putting that construction on the Charter-Party, I feel it my duty to pronounce that the owners of the cargo have fulfilled their obligations by bringing in the sum of money already deposited in the Registry. I therefore dismiss them from any further demand from the other party, and with their costs.

Owners dismissed.

Proctors:—*Gostling*, for the bondholder; *Tebbs*, for the owners.

The following case in this Court, which has not been reported, and has some bearing upon the preceding, is here given, from a short note taken at the time by the Editor.

DECEMBER 18, 1826.

THE "TRIAL."—The vessel was dismasted in a storm, July, 1825, in Rupert's Bay, Dominica, waiting for cargo. Being unable to refit at this island, she went to Antigua, where the master, being without funds or connections, raised £2,000 on bottomry, at 8 per cent., hypothecating ship, cargo, "now on board or that may

hereafter be put on board," and freight. The vessel returned to Dominica, took in more cargo, and arrived in the port of London in February, 1826, where she was arrested at the suit of the bondholder. Several parties appeared as defendants,—the owners of cargo shipped at Dominica, in November, 1825, without a knowledge of the bond and of the liability of those goods, and the consignees who had paid freight in this country before and after the arrest of the ship, and were now required to bring the amount into Court. On the part of the bondholder, it was contended that the whole cargo was liable to contribute to the payment of the bond. On the part of the shippers in Dominica subsequent to the date of the bond, it was urged that they were exonerated by reason of their ignorance of the transaction. The owners of the cargo shipped prior to the bond opposed the exoneration of the latter parties. Those who had paid freight contended that they should not be called upon to bring it in; but it was replied that the alleged payment was only a deposit to the Dock Company, who would retain it for those legally entitled to it.

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LORD STOWELL.

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I shall order the freight to be brought in. I had conceived the fact to be, that the parties knew nothing of the bond. With respect to the shippers abroad, I take the law to be clear, that where the master has deserted his duty, and given no notice of a bond, he is to be answerable; the owners of the goods must have recourse to him; he has neglected his duty. But those who knew of the existence of the bond should have taken care to whom they paid the freight; the *laches* is theirs. I never saw a more proper bond, or a lower rate of interest in such a case.

Prerogative Court of Canterbury.

JUNE 14.

3rd Sess.

IN THE GOODS OF ANN STANDLEY, SPINSTER, DEC.— A will, in *Motion, ex-parte*.—The testatrix died 26th December, 1848, which the signature of the leaving a will, dated 29th May in the same year, whereby testatrix was

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Standley, dec.

placed immediately after the attestation-clause, which was written at the top of the second side of the sheet of paper,—the first side being filled,—admitted to probate, some dispositive words written below the attestation-clause being excluded.

she appointed two executors; her property being under £600. The will was written on one side of a sheet of paper, and the concluding words are "revoking all former wills, whereof I have set my hand and seal, dated this 29th May, 1848." These concluding words bring the writing down to nearly the edge of the paper at the bottom of the first side. At the top of the second side is the attestation-clause, "signed, sealed, published, and declared," &c., and immediately under it are the signature and seal of the testatrix. Between the attestation-clause and the signatures of the witnesses is a considerable space, and on the left-hand side are these words: "I bequeath my bed, bolster, and two pillows, and dimity bed-furniture, and counterpane, and window-curtains, to Mrs. A. R.; my cloaths I leave to H. B. and her two sisters, and to E. B. I leave my tea-caddy." It was at first supposed that the additional words were inserted after the testatrix and the witnesses had signed, but, according to the affidavit of the writer of the will, they were written before.

MOTION.

Dr. Deane now moved for probate of the will, including the words below the attestation-clause, citing *Re Beadle*.*

DECREE.

SIR H. JENNER FUST.

I am of opinion that this is a good execution of the will, and that the name of the testatrix, immediately following the attestation-clause, is signed at the foot or end of the will; but the Court cannot grant probate of the words added below the attestation-clause, for if they were to form part of the will, the signature of the deceased is not at the foot or end. Decree probate of the will without the additional words after the attestation-clause.

Probate decreed.

Currey, Proctor.

Attestation.
— Where the
attesting wit-
nesses placed

IN THE GOODS OF REV. EDWARD CHAMNEY, DEC.—
Motion, ex-parte.—The deceased died 5th April, 1849, leaving a widow and an only child, a minor. On the 26th

* *Antea*, p. 43.

January, 1849, he made a will in his own handwriting, bequeathing his whole property to his wife for life, and after her death to his son, not appointing any executor. The will is written on one side of a sheet of paper, and on the back is written with his own hand the following endorsement: "The last will and testament of Edward Chamney, this 26th January, 1849, witness." Upon that day the deceased produced the will to two persons, J. F. and J. J., and requested them to witness its execution, which they consented to do, J. F. having previously read the will over. The deceased then, in their presence, signed his name at the foot or end, and then requested them to sign their names as witnesses on the back, under the word "witness." J. F. suggested that they ought to sign at the foot or end, where the deceased had signed; but the deceased said they should do so on the back, and they then, in his presence, and in the presence of each other, subscribed their names, as witnesses, under the word "witness," on the back of the will. After the death of the deceased, the widow, being told that the will was invalid, as the signatures of the witnesses were not at the foot or end, obtained administration as if the deceased was dead intestate. The property was under £1,500.

Dr. Dodson now moved the Court to revoke the administration already granted, and to decree administration with the will annexed to the widow, as universal legatee for life, arguing that the Statute said nothing as to the locality of the witnesses' names.

SIR H. JENNER FUST.

On the face of the paper there is the signature of the deceased only, without any attesting witness; but there appears on the back of the will an endorsement, "The last will and testament of Edward Chamney, this 26th January, 1849, witness;" and then follow the names of two witnesses. The question is, whether this is a good attestation. At the time of the execution, there seems to have been some dispute between the deceased and one of the witnesses, as to the proper place for their signatures; the witness represent-

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their signatures not at the foot or end of the will, where the testator's signature was placed, but, by direction of the testator, after the word "witness," in an endorsement at the back of the will: — Held, that this was a good attestation, the Statute not having specified any locality for the witnesses' signatures.

DECREE.

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ing, according to his view of the law, that their signatures ought to be placed below the signature of the deceased, and no doubt that was the most proper place. But I do not see that the Statute has pointed out any place for the signature of the witnesses: the proper place undoubtedly is, under the signature of the testator, and there is room for their signatures here. But they have signed the endorsement on the back of the will, as attesting the execution, and I am not aware that this is not a good execution of the will, as the Act says nothing about the place where the names of the

A good attestation.

witnesses shall be signed. I am of opinion that this is a good attestation, though certainly it would have been more regular if the signatures of the witnesses had been at the place where the testator signed. But a discussion having taken place upon this point at the time, the deceased insisted that they should sign at the back, and they acquiesced, contrary to their judgment, and their better judgment.

Administration with will decreed.

I revoke the former administration, and decree administration with the will annexed to the widow, as widow (having some doubt whether the words in the will convey the whole property) and universal legatee.

Fox, Proctor.

Consistory Court of London.

JUNE 16.

Divorce by reason of adultery, by the husband against the wife. — The conclusion of guilt drawn from a combination of facts, in the ab-

FAUSSETT v. FAUSSETT.—*Cause.*—This was a suit for a divorce by reason of adultery, promoted by the Rev. Bryan Faussett against Helena Caroline, his wife. The Libel, which was admitted without opposition, pleaded as follows:—

1—3. The marriage of the parties on the 4th October, 1837, the birth of two children, and cohabitation until April, 1847.

4. That, on the 5th August, 1846, Mr. and Mrs. F., with their two children and maid-servant, left Cropthorn, Worcestershire (of which parish Mr. F. was curate), to visit her relations in Northumberland, and proceeded to York, where they separated, Mrs. F., with her children and maid-servant, going to the house of her brother, Mr. Edward Spencer Trevelyan, at Long Witton, near Newcastle, where she remained until September following, and Mr. F. to pay a short visit to Lady Trevelyan (mother of Mrs. F.), then at Harrowgate, from whence, after visiting his father, Dr. Faussett, in Kent, he returned to his duties at Cropthorn; that, whilst Mrs. F. was at Long Witton, Mr. Walter Blackett Trevelyan, her second cousin, then residing with his father, at Nether Witton, a short distance from Long Witton, was in the habit of frequently calling at the house, and occasionally passing some days there, and on such occasions was much in the society of Mrs. F.; that, in a short time, an undue intimacy sprung up between them; they frequently walked out alone together, and were often alone together in the house, and by their general conduct manifested an extraordinary and unbecoming attachment. 5. That, on the 2nd September, 1846, Mrs. F., without communicating her intention and wholly unknown to her husband, accompanied by her children and Jane Rochester, a servant hired by her during her stay at Long Witton, proceeded to Seaton Carew, a watering-place near Hartlepool, where she engaged a lodging in the house of a Mrs. Dixon, consisting of a drawing-room and two chambers, which she occupied until the 13th October following; that, a day or two after her arrival at Seaton Carew, Mr. W. B. Trevelyan arrived, and though he slept at the hotel, and afterwards in the house next adjoining Mrs. Dixon's, continually lived with Mrs. F., breakfasted, dined, and drank tea with her, walked out with her, and passed each day with her, during the time (save short intervals of his absence from Seaton Carew) she continued in the lodging; that he generally remained alone with her in the drawing-room until a late hour at night; that they frequently addressed each other in endearing language, and appeared to live on the same terms of intimacy as husband and wife. 6. That one evening, whilst they were so living at Seaton Carew, shortly after the servant had taken away the tea-things from the drawing-room, and whilst they were alone together therein (and in which drawing-room there was a sofa), the door was locked from withinside, and they remained in the room for several hours, and until he quitted the house, and that, on that occasion, as on many other occasions, when the parties were so alone in the said drawing-room, they

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sence of direct proof.—The effect of a letter from the wife, and the admissibility of oral evidence, as proof of an acknowledgment of guilt, considered.

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committed adultery. 7. That, on the 13th October, 1846, Mrs. F., with her children and servant, returned home to Cropthorn, and on the 17th was joined by her husband, whose return home on that day had been previously fixed by him, and was well known to her; that, on the night of such return, Mrs. F. evinced great coldness and indifference towards him, and, under the pretext that her children were sleeping in the bed heretofore occupied by them (the parties), desired that they should not be disturbed, and that a separate bed should be made up for Mr. F. in another chamber, and on the following day, assigning as a reason that she and her husband did not intend to sleep together, gave directions that a separate bed-room should be prepared for him in future, and which he accordingly occupied, and he never afterwards slept or had sexual intercourse with his wife. 8. That, in November, 1846, Mr. W. B. Trevelyan, with whom, as a relative of his wife's family, Mr. F. had become acquainted, was, at the suggestion of Mrs. F., invited to Cropthorn, where he remained for several days, and in January following, he was, at the like suggestion of Mrs. F., again invited, and again went there, and remained for two or three weeks; that, during both such visits, he and Mrs. F. frequently conducted themselves towards each other, in language and manner, with unbecoming familiarity, and on several occasions committed adultery, as hereafter more particularly pleaded. 9. That, whilst Mr. W. B. Trevelyan was so at Cropthorn, he and Mrs. F. were frequently alone together in his bed-chamber; that on one occasion, after family prayers, about ten o'clock in the evening, whilst Mr. F. was in his study, in which he used to remain until a very late hour, and until after the whole household had retired to bed, Mrs. F. being on the landing-place, and near to her own chamber door, within sight of which was the chamber occupied by Mr. W. B. Trevelyan, was invited by him to go into his chamber, on pretence of seeing how well the fire burnt; that she entered the chamber, the door of which was immediately after shut, and they remained alone together therein for twenty minutes, when she went into her own room, at which time her hair was in much disorder; and that they committed adultery on that occasion. 10. That they frequently called each other by endearing names, and addressed each other as "my dearest," "my love," and used other fond expressions, and that on one occasion, during one of Mr. Trevelyan's said visits at Cropthorn, whilst going up stairs together to their bed-rooms, they embraced and kissed each other. 11. That, on another occasion, whilst Mr. Trevelyan was so at Cropthorn, the maid-servant of Mrs. F., having gone in the

morning to light the fire in her mistress's bed-room, did not find her therein, and suspecting she was in that of Mr. Trevelyan, gently tried to open the door of his room, but found it locked; that, about an hour afterwards, Mrs. F. was seen to come from his bed-room, and go into her own; and it pleads adultery on that occasion. 12. That, whilst Mrs. F. was at Seaton Carew, she became pregnant, and shortly after her return to Croppthorn, a report became prevalent in the village that she was so, and the report having, in the February following, for the first time, been made known to Mr. F., who had for several months had no sexual intercourse with his wife, he immediately communicated the same to her; that she indignantly denied the charge, and expressed a determination to quit Croppthorn, under the pretence that she could not submit to remain in a place where her character was so maligned; that Mr. F., in the full belief that the imputation was unjust, and that she was not pregnant, and sympathizing with her in her mental suffering, consented that, with her two children, a governess, and a maid-servant, she should go to the Continent for a short time, he promising to join them as soon as he could make arrangements for his parish duties; that, accordingly, on the 11th March, 1847, he and his wife, with the two children, a governess, and a maid-servant, went to London, whence, on the 13th, they (with the exception of Mr. F., who returned to Croppthorn) proceeded to Frankfort. 13. That, during the time they were in London, Mrs. F., unknown to her husband, wrote and sent several letters to Mr. Trevelyan, who clandestinely effected an interview with her. 14. That, on the 3rd April, 1847, about ten days after Mrs. F. reached Frankfort, Mr. F. joined her, and whilst so there he received communications from England of renewed reports unfavourable to the character of his wife, and urgent advice that she should return to England; that having informed her of such communications, she in so earnest and solemn a manner denied that she was pregnant, as for a time to convince him that she was innocent, but that, on being again pressed upon the subject, she did not deny that she was pregnant, whereupon he, for the first time, became aware of her guilt, and immediately brought her back to England, and, leaving the children with his father, and dismissing the governess, placed her with Lady Trevelyan, her mother, at Wallington, Northumberland. 15 and 16. That on the day following the arrival of Mrs. F. at Wallington, namely, on the 22nd April, 1847, she wrote and sent a letter to Miss Faussett, her husband's sister, then residing with her father, which is annexed to the Libel. 17. That,

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in May, 1847, Mrs. F. left her mother's house at Wallington, and went to Edinburgh, where she took apartments in the house of Mary Cumming, and in the following month, Mr. Trevelyan, having gone to Edinburgh, was in the habit of frequently calling on her, and remaining alone with her in the house, pretending to Mary Cumming and her servant that he was her brother; that, on the 6th July, 1847, Mrs. F. was delivered of a male child, and that on the day of its birth, and until within half an hour of that event, Mr. Trevelyan was with her, and on the third day after her confinement, visited her in her bed-room, and subsequently and almost daily was with her alone in her bed-room and in the drawing-room, and when Mrs. F. was sufficiently recovered to go out of doors, was in the habit of walking out with her, or accompanying her in a carriage, and evinced towards her on all occasions the greatest fondness and attention. 18. That on Sunday, the 22nd August, 1847, Mrs. F., being desirous that the child should be baptized according to the rites and ceremonies of the Church of England, authorized and directed Mrs. Trevelyan, the wife of Mr. Trevelyan of Nether Witton, and the mother of Mr. W. B. Trevelyan, to call on the Rev. John Alexander, the officiating minister of the Episcopal Church of Columba, in that city, for the purpose of making arrangements for the baptism of the child on the following day, which Mrs. Trevelyan accordingly did, and on such day, namely, the 23rd August, Mrs. F., accompanied by Mrs. Trevelyan, went to the church with the child; that on such occasion, Mrs. Trevelyan, in pursuance of the authority and direction of Mrs. F., went into the vestry-room where Mr. Alexander was, for the purpose of giving him instructions, as she had been deputed to do by Mrs. F., with respect to the entry of the baptism in the Register Book of Baptisms; that in the course of making such entry, Mr. Alexander inquired the name of the father of the child, whereupon Mrs. Trevelyan burst into tears, and stated that the child was illegitimate; that the mother of the child was Mrs. Bryan Faussett, then in the church, whose husband was a clergyman resident at Cropthorn, and that her own son, Mr. W. B. Trevelyan, was the father of the child; that, immediately afterwards, the child was duly baptized by the names of "Herbert Trevelyan," in the presence of Mrs. Trevelyan and Mrs. F., who acted as sponsors. 19. That, at the time of the discovery that Mrs. F. was pregnant, at Frankfort, in April, 1847, Mr. F. was possessed of very slender means wherewith to support himself and his two children, in consequence of which he was unable to encounter the expenses attendant on a suit for divorce, but that,

having been since led to believe that his wife intended to pass off the child born at Edinburgh as legitimate, his father had consented to furnish the requisite pecuniary aid for the prosecution of this suit. 20. Pleads non-intercourse between the parties since August, 1846, and non-residence in the same house since April, 1847.

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No plea was given in on behalf of the wife, and no interrogatories were addressed to the witnesses examined on the Libel.

Drs. Phillimore and R. Phillimore, for the husband; *Drs. Harding and Robertson*, for the wife.

DR. LUSHINGTON.

JUDGMENT.

The only question for the Court to determine is, whether there be sufficient legal evidence to establish the guilt of the party against whom the suit is brought. Had the evidence been clearly adequate for that purpose, I should have followed my customary course, of pronouncing for the separation without stating or commenting upon the evidence; but when the conclusion to be drawn, whether of guilt or innocence, is not beyond all controversy clear; where the result to be arrived at depends upon a combination of all the facts in evidence, and not on some prominent facts, necessarily leading to adultery, indisputably proved, then it would be a dereliction of duty if the Court did not publicly state the grounds upon which its Decree was founded. And this duty is more imperative where evidence has been offered, of no small importance if admissible, the admissibility of which is questionable.

Mr. Faussett is a clergyman of the Church of England, and was married on the 4th October, 1837, to Miss Trevelyan. There were issue of this marriage two children. The usual residence of the parties was Cropthorn, in Worcestershire, of which parish Mr. Faussett was curate. During the first nine years of the marriage nothing is alleged to have occurred, and there is nothing in the evidence which in any degree requires the notice of the Court. The adultery with which Mrs. Faussett is charged is alleged to have been committed with Mr. Walter Blackett Trevelyan, Facts pleaded, and evidence.

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a second cousin of Mrs. Faussett. The particulars of that charge, so far as they are set forth, are to be found in the 4th article of the Libel, which charges the formation of an undue intimacy. This charge of the formation of an undue intimacy is the foundation of all that follows, and yet there is but one single witness examined upon it, Jane Rochester, the maid-servant of Mrs. Faussett, with whom it appears she had at one time quarrelled, though I think the whole tenour of her evidence shows that she is a fair and upright witness. It is somewhat singular that an article of this kind, which might have been supported by other testimony, should be left to depend upon the evidence of this witness alone, who did not enter that service till the 9th September, and on the 22nd Mrs. Faussett left Long Witton.

This witness, as might have been expected, does not prove any essential part of this article. She says: "I first saw Mr. W. Trevelyan whilst I was living with Mrs. Faussett at Long Witton. I saw a gentleman one day on horse-back riding away from the house, and Mrs. Faussett's maid said he was Mr. Trevelyan, of Nether Witton, meaning Mr. W. Trevelyan; and the only other time I saw him or knew of his being at the house at Long Witton, whilst we were there, was the day we came away. He came out and handed Mrs. Faussett into the carriage. That was the first time I had seen him in company with her." All the proof of this article amounts to this: that Mr. W. B. Trevelyan visited at Long Witton, and was acquainted with Mrs. Faussett; consequently, the case I have to examine commences without proof of any fact prejudicial to Mrs. Faussett, so far as relates to the 4th article.

The 5th article pleads the transactions which took place at Seaton Carew, and the time, as I collect from the evidence, was from the 22nd September to the 13th October, about three weeks. The article pleads that the going thither was unknown to Mr. Faussett and without his consent; of which there is no proof whatever. This article does not charge adultery, nor even any act of indecent familiarity, but merely pleads great intimacy, which might naturally give rise to strong suspicion of a closer intimacy. The proof

rests upon the evidence of three witnesses, Jane Rochester, the maid-servant of Mrs. Faussett, and two persons named Dixon, at whose house Mrs. Faussett was lodging. The evidence comes to this: that Mr. Trevelyan was there backwards and forwards; that the last time he stayed a week; that he took all his meals,—breakfast, dinner, and tea,—with Mrs. Faussett; that he stayed till late at night, eleven or twelve o'clock, and that there was an extreme degree of intimacy between the parties. The depositions of the witnesses prove more than is charged. At the conclusion of Mr. Dixon's evidence are the following words: "From what I saw pass between them on one occasion while they were walking out together,—I watched them on the occasion,—I can state that they not only appeared to live, but did certainly live, on the same terms of intimacy as husband and wife." Now how is the Court to deal with evidence of this description? The witness does not state he observed any indecent familiarities between them, nor anything that did occur, so as to give the Court any means of forming an opinion. I am clear that the Court would not be justified in considering this evidence as proof of an adulterous intercourse between the parties. Knowing none of the facts from which the witness draws his inference, the Court cannot lay any stress upon it. Enough, however, is proved, and I say more than enough, by the evidence upon this article, to excite the vigilance and suspicion of the Court. So far it is possible, though not probable, that the intercourse might be innocent; but such an unrestrained intimacy between these parties,—of a married lady, in the absence of her husband, with a gentleman so distantly allied to her,—may very easily, by other evidence, be converted into a connection of a very different and a very culpable kind.

The 6th article pleads that the parties remained in the drawing-room with the door locked, and charges adultery then and on other occasions in the drawing-room. Now let us consider the effect of the evidence, for the facts must not merely be pleaded but proved. Certainly, if the parties did so fasten the door of an evening, and did so remain with it.

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fastened, and for no assignable reason, such circumstances lead strongly to the conviction of an adulterous intercourse between them. But it is necessary to look at the proof. The only witness is Jane Rochester; the Dixons can say nothing. Jane Rochester, upon this article, gives her evidence in the following words; and, I repeat, I think she intends to state the truth: "On one night, at Seaton Carew, whilst Mrs. Faussett and Mr. W. Trevelyan were alone in the drawing-room together, I heard the door of that room bolted from withinside." Now there is not a great deal of difference between locking a door and bolting a door, but the difference of sound may be of some importance. "I am sure that I could be under no mistake about it, though I did not try the door, but the drawing-room door was close by the stairs, and from the kitchen below, where I was, I could hear any one walking in the drawing-room or do such a thing as fasten the door." Now I must say, a person must have a peculiar faculty of hearing, if, being down in the kitchen, she could hear a door bolted upstairs, unless it differed from ordinary doors, or the bolt made more than the ordinary noise. As to hearing Mr. Trevelyan walk across the room, that may be probable enough; but as to hearing the bolting of the door, the Court should consider well before it gave credence to that circumstance. "I distinctly heard the footsteps of some one in the drawing-room, and from the tread I believe it was Mr. W. Trevelyan's, go across the room to the door, and then I heard the bolt drawn. I heard the door unbolted that night; it might be an hour, more or less, I cannot speak positively as to the time, it remained bolted, but certainly it remained bolted for a considerable time. It was unbolted some time before Mr. W. Trevelyan left for the night. I distinctly heard it unbolted as well as bolted, and there was a considerable interval between the times of its being bolted and unbolted." When she is asked what inference she drew from this, she says: "Whether, on that or on any other occasion of their so being together in the drawing-room at Seaton Carew, any impropriety passed between them, I cannot tell; I cannot say that I thought so at the time. I believe I was

writing at the time I heard the drawing-room door bolted, and I did not at the moment give any thought to it one way or the other. I mentioned the circumstance at the time (on the next day) to the landlady, Mrs. Dixon, and I inferred from what she said that she suspected something wrong; but I cannot say that I did. I had heard Mrs. Faussett so highly spoken of that I could not bring myself to believe that she would be guilty of anything of the kind, and though before this, from what I had heard her former maid say, my observation had been drawn towards her and Mr. W. Trevelyan, I had never been able to detect anything improper in their conduct towards each other." I confess I have very great difficulty in coming to a satisfactory conclusion as to the effect of the whole of this evidence. It is strange that she should have heard the door bolted and should yet draw no conclusion as to any impropriety of conduct between the parties. Her suspicions had been awakened and her observation drawn to the conduct of the parties by something which had been said by the former maid; nevertheless, though she hears the door bolted, she does not draw any conclusion that it was done for any improper purpose. It is true that the Court is not bound by the conclusion of the witness, but will draw its own conclusion from the facts; still the opinion of the witness is of no small importance, with reference to the establishment of the facts, to satisfy the mind of the Court, where I have an honest witness, and that honest witness draws no conclusion of guilt. The effect I attribute to this evidence is this: it is a circumstance to be duly weighed in the progress of the cause, in conjunction with what follows; but it is not a fact upon which, standing alone, I could safely found my sentence.

The 7th article pleads the return of Mrs. Faussett to Cropthorn, and that Mr. and Mrs. Faussett did not sleep together nor ever cohabit afterwards. Jane Rochester proves the article to this extent, but not other parts of the article, as that Mrs. Faussett received her husband with coldness and indifference: on those parts of the article there is no evidence.

The 8th article pleads the visits of Mr. W. Trevelyan at

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Crophorn in November, 1846, and January, 1847, and adultery there committed. The evidence upon this article is contained in the testimony of Jane Rochester and Charlotte Berton, and I first address myself to that of Jane Rochester. "After our return to Crophorn, Mr. W. Trevelyan came twice and stayed on a visit there with Mr. and Mrs. Faussett. I do not know at whose suggestion he was invited on either occasion." It is not proved that it was at the suggestion of Mrs. Faussett. "He and Mr. Faussett seemed to be very well acquainted; they were very friendly and intimate. Mr. W. Trevelyan's first visit at Crophorn happened a few weeks after our return there. He stopped about ten days then, I think; the other time he stopped about three weeks. I used to see Mrs. Faussett and Mr. W. Trevelyan in company together during his visits. They associated together very much, but I cannot say that, in my presence or hearing, they ever conducted themselves towards each other, in language or manner, with unbecoming familiarity, or in any respect different from what they might have done in the presence of Mr. Faussett himself, except on the two occasions which I shall have to describe, I believe." Therefore, excepting these two occasions, so far as regards the general conduct of the parties, this witness proves nothing upon this article but that Mr. Trevelyan was on intimate terms with Mr. and Mrs. Faussett.

Charlotte Berton says: "I used to think, from what I saw of Mrs. Faussett's behaviour with Mr. W. Trevelyan, during both his visits, that they were a great deal too familiar; much more so than I should have liked had I been Mrs. Faussett's husband. I considered that they conducted themselves towards each other with very unbecoming familiarity; I witnessed it both in language and manner. I once saw Mr. W. Trevelyan put his arm round Mrs. Faussett and kiss her. That was the only direct act of improper familiarity that I exactly witnessed pass between them; but I saw by their general manner to each other, the way they addressed each other, and the loving looks that I observed pass between them, that they were, as I considered, a great deal too intimate. I certainly had my misgivings about

them, from what I saw of them, that there was an improper understanding between them."

Now there is one instance proved by this witness upon which the Court may safely rely, namely, that, on one occasion, Mr. Trevelyan put his arm round Mrs. Faussett, and kissed her. As to the rest, it is stated in general terms, and though it may not be less accurate than the other, the Court cannot rely on what is the mere inference of the witness.

The next article is one of considerable importance. It pleads the going into the bedroom of Mr. Trevelyan, at Cropthorn, and the commission of adultery. Jane Rochester is the first witness on this article, and she says: "It is not the fact, so far at least as is known to me, that Mr. W. Trevelyan and Mrs. Faussett were frequently alone together in his bedroom whilst he was staying at Cropthorn; I never knew it happen but once. It was just after we had come up from the family prayers, about ten o'clock at night. Mr. Faussett was down stairs, I think, in his dining-room; he usually sat there. He used to remain up for an hour or two generally after the rest of the house had all gone to bed. Every night, after leaving the room when prayers were read, I used to go to the kitchen to get a light, and then proceed by the back stairs up to Mrs. Faussett's bedroom, to attend on her before she got to bed. On the night in question, I had just got up to the backstair-door, which opens on the landing on which Mrs. Faussett's bedroom was, when I saw her and Mr. W. Trevelyan coming up stairs. They were on the landing, and Mr. Trevelyan had turned to go towards his bed-chamber, which was on the same floor, down a little passage, but in sight of Mrs. Faussett's bedroom, when I heard him say to Mrs. Faussett, 'Helena, I find I have got a fire in my room.' 'Yes,' Mrs. Faussett said, 'I ordered it.' He then asked her to come and see how nicely his fire burned; and upon that she went towards his bedroom-door. I saw her go in the direction, but I did not exactly see her turn and go into the room, for, before she reached the door, I had got to her room, and gone in, and the door closed; it closed of itself always. I waited for Mrs. Faussett in her bedroom. She

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came in in about twenty minutes after. Her hair when she came in was crumpled, certainly, but not in such a degree as to make me remark it; for her hair of a night, when she came to bed, generally was very tumbled. She had a way of putting her fingers through her hair of an evening, and in that way tumbling her hair. I did not hear the door of Mr. Trevelyan's bedchamber closed after seeing her go towards it that night, but Mrs. Faussett's bedroom-door being closed might prevent my hearing that. That she had been in his bedchamber with him during those twenty minutes I was waiting for her in her room that night I have not the slightest doubt. Whether any impropriety of conduct took place between him and her, I cannot take upon myself to say. Of course, I could not suppose that her being in his bedroom with him so long was to be accounted for otherwise than that any improper intercourse subsisted between them; but beyond knowing that they were together in his room, I had no other reason to come to that conclusion than what arose from my own suspicion. They were always on very familiar terms; but, excepting as regards what happened on the occasion just mentioned, and the other occasion I have to describe, I never witnessed anything in their behaviour in Mr. Faussett's absence different from what I used to see it was in his presence: so that I really did not know what to think."

I have already said, I see no reason to doubt the intentional veracity of this witness, and yet her evidence is anything but of a satisfactory character. She has no doubt herself that Mrs. Faussett remained in Mr. Trevelyan's bedroom twenty minutes, and yet it is clear, looking at her evidence, that she had no positive proof of the matter: it is all inference. She did not see Mrs. Faussett enter the room, and, during the time, the witness was in another room with the door closed. Why, Mrs. Faussett might not have entered the room, or might have gone down stairs or elsewhere, without the knowledge of the witness. It may be, under the circumstances, a very suspicious transaction; but that will not lead to the conclusion that adultery took place

at this time. The witness, moreover, states this as a transaction of perfect publicity.

Now let us turn to the evidence of Charlotte Berton, and see what she proves. She says: "Certainly, on more than one occasion, whilst Mr. W. Trevelyan was stopping at Cropthorn, I have known Mrs. Faussett and him to be alone together in his bedroom; but I never saw it but in the daytime, and as Mrs. Faussett went in there at these times without concealment apparently, and I heard her chatting with him in his room, I never thought anything of that, so far as supposing that anything improper passed between them on the occasion." So that this witness does not in the slightest degree support the case; she leaves it as it was. Her evidence would prove great recklessness of due decorum, but not criminality. I must say it is a most remarkable feature in this case, that there does not appear any evidence of the slightest concealment towards Mr. Faussett himself. All parties were living together in the parsonage-house,—in all probability a small house,—and without attributing any moral culpability to Mr. Faussett, it is difficult to understand how his eyes could be shut, if the course of circumstances was such as is represented in the pleadings and in the Argument—I do not say in the evidence, but as the case is stated in the pleadings and set up in argument; I cannot see how Mr. Faussett could have been ignorant of the facts. It must be recollected that he has pleaded that he did not sleep with his wife since 5th August, 1846, and that Mrs. Faussett, on her return to Cropthorn, received him with coldness and indifference.

The 10th article, which contains a charge of the parties kissing, is spoken to by Jane Rochester. She says: "I never heard Mrs. Faussett and Mr. W. Trevelyan call each other by endearing names, or make use of fond expressions towards each other. One night, during one of Mr. Trevelyan's two visits at Cropthorn, as I was going into Mrs. Faussett's bedroom, after prayers, as usual, I saw her and him coming up stairs together. I went into her bedroom, and presently after, just as she and Mr. Trevelyan

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reached the landing, where they would separate to go to their respective bedrooms, I heard a rustling of her dress and a noise such as would be made by a person kissing another, and directly after, Mrs. Faussett came to her bedroom:" and she has not the least doubt that Mr. Trevelyan kissed Mrs. Faussett, though she did not see it. Now, I should have some difficulty in my own mind to pronounce that the fact of kissing is proved by the evidence of this witness alone. However, I admit there is evidence of this fact, but it is weak evidence, and it increases the vigilance of the Court and the suspicion of the Court. But the Court is not driven to rely upon this witness alone; she is strongly corroborated by Charlotte Berton, who in giving her evidence seems to have had a stronger conviction upon her mind than Jane Rochester. She says: "I frequently heard Mrs. Faussett and Mr. W. Trevelyan address each other in very loving terms; I have heard him address her as 'My love,' and 'My dearest,' and I have heard her call him 'Dear Walter,' and 'Dearest Walter;'"—it is singular that Jane Rochester did not hear this—"that has been when I was in and out of the room for some purpose or other, or clearing the room, or the adjoining room. It was on the top of the staircase that I saw Mr. W. Trevelyan put his arm round Mrs. Faussett, and kiss her; but it was in the daytime, not at night, after prayers." Here is a fact of kissing distinctly proved by the evidence of Berton, but in the daytime, corroborating the testimony of Jane Rochester, or rather her inference.

The 11th article is not proved at all. We now come to the 12th article; and that is a very long one indeed. I do not think I should occupy time in going into all the particulars contained in this article. Some part is proved, and some part not proved, and the article is what is called in these Courts historical. It refers to the facts of Mrs. Faussett becoming pregnant, and her removal to Frankfort, in Germany, on the 11th of March, 1847. This article is proved by the evidence of Dr. Faussett, not, indeed, very minutely or very accurately; but this could not be expected, for it is of a description which does not demand any very

precise evidence. Jane Rochester confirms Dr. Faussett; she states that reports were prevalent that Mrs. Faussett was pregnant, and that she went with her to Frankfort.

The 13th article pleads a clandestine correspondence, and an interview at this time between Mrs. Faussett and Mr. W. Trevelyan. Now here is proof, because Jane Rochester proves the writing of several letters from Mrs. Faussett to Mr. Trevelyan, and the interview with him at the hotel.

The 14th article pleads the renewal of the reports of Mrs. Faussett's pregnancy; that suspicions were excited in the mind of Mr. Faussett, who went to Frankfort, and accused Mrs. Faussett of having committed adultery: the result of that accusation the Court is not able distinctly to arrive at, because these are matters which took place between the parties when no one else was present. Jane Rochester states that the same night that Mr. Faussett arrived at Frankfort, "I heard him tax Mrs. Faussett to her face, not, that I recollect, with being pregnant,—not in direct terms,—but with having been criminal with Mr. W. Trevelyan. This was immediately on his arrival. In fact, the first I knew of his being arrived was by hearing quarrelling going on between him and Mrs. Faussett in the adjoining room. After a bit, I was called into the room to do something to the children, and then I saw Mr. Faussett. He then before me charged Mrs. Faussett with her guilt. I do not think that she directly admitted herself guilty; according to my recollection, I should say that she neither admitted nor denied what she was charged with—criminality with Mr. W. Trevelyan, that is. I had previously quarrelled with Mrs. Faussett, and had made up my mind to leave her, though not so soon as I did. In consequence of what passed on the night of Mr. Faussett's arrival at Frankfort, I determined to leave at once." It appears from the evidence of Dr. Faussett, that Mr. Faussett brought his children to his house at Oxford, and left them there, Mrs. Faussett being placed with her mother at Wallington.

Now the evidence of Rochester differs in some degree from the article. She deposes that Mr. Faussett charged his wife directly with adultery with Mr. Trevelyan; but the

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article does not plead this fact, founding the charge of adultery upon the fact of pregnancy after cessation of cohabitation; whereas the cessation of cohabitation is alleged to have taken place only from August, 1846, and no reason is assigned for it then, and there is no proof of cessation of cohabitation until the middle of September. I must say that, as to the cohabitation, as far as I can make out, the Libel is not very consistent with the evidence; but there may be some difficulty in proving when cohabitation ceased.

Letter of the
wife.

I now come to the 15th and 16th articles, which plead the letter written by this lady, whilst resident with her mother, and addressed to Miss Faussett, the sister of her husband; and this letter it is necessary to read:—

Wallington, Thursday,
April 22nd.

My dearest Susan,

I know not whether it is right of me to write so much to you, but it is the only consolation I have; there is no person for me to speak to, for I must not bother poor Mama with my miseries. Spencer and Catherine are going home to-day, and Arthur, I am sorry to say, is obliged to go to Edinbro' to-morrow. He was very sorry not to see Bryan yesterday, and I was not prepared for his sudden departure, and should have been so thankful if he could have staid a few hours longer. My miseries I now feel more than ever, for the last few days I have been in a whirl: I could not think; everything has come upon me so suddenly. On Monday morning, my children were both with me in bed; I washed and dressed them on Monday night. I am alone, and more alone I feel every minute. I miss the sound of their sweet voices. I have nothing now to interest me. But the punishment is mine. They, dear, precious, darling things, are happy. God grant they may always be so! It is so dreadful to awake in the morn, and find myself alone, and everything reminds me so of them. I was up early this morning, and walked down to Arthur before breakfast. How my children would have run to gather the flowers! Do, pray, when you write, tell me what they do at the different hours, that I may be able to fancy them more distinctly, and tell me if they still love me, and tell me if they are quite happy and contented. Pray, take care of dearest Emy, and do not let her get excited. Kiss them for me. Thank Bryan much for his kindness to me during our sad journey. Mama is

very kind, but I would rather be in a dirty lodging in a dull town, because here I feel that everything is too good for me. I am surrounded with every luxury and every comfort, and what do I deserve?—nothing. I hope Bryan will have a good journey. To-night he will see my children, have their little arms round his neck, and kiss their precious dear faces. I hope they will like the things I sent them. I dare say they will get you to read the book to them. Bobo must sit in your lap, and dear Emy by you, working at her stool.—Friday.—This day week we left Frankfort. Oh, Susan, every moment, I long more and more to see and hear my children. If I lose all hope of seeing them, I must just die : all care, all interest for everything is gone from me. I try to be as cheerful as I can before Mama, but it is such a blessing to be alone. Catherine tried to persuade me to go to Edinboro' to-day with Arthur, but I remembered Bryan's advice, and said I should stay here. It is $\frac{1}{2}$ past 10. I fancy my darling children are running about in the garden, and how I wish I was watching them ! Oh, write to me and tell me of them, or I feel I must, I shall,—oh, I don't know what I shall not do ! Dearest Susan, pray for me ! Will you please tell Bryan that, from some allusions which he made the other day, I am *quite positive* a great many untruths have been told about me, and I do not think that anything Rochester may have said ought to be believed, as I am equally positive that she could *never* have either seen or heard anything which was not proper. I wish now I had asked Bryan what she *did* say ; but really, true or untrue, I could not bear to hear all the things. Somehow or other, I cannot help feeling that, if it had been so ordered that we should not now been parted, we should have gone on more happily than we have ever done before. I had so determined to do what was right, and to be more amiable, and Bryan was so kind to me in Frankfort, that I felt I could have done anything for him, and am sure he would have got to love me whether he wished it or not. As it is, I care not what becomes of me, and feel as if I should never have energy sufficient for anything again. * * * *

I do not read the rest of the letter, as it does not contain anything which it is necessary for the Court to comment upon. It is impossible not to say that it is very difficult to reconcile the whole of this letter, and the expressions in it ; part savours of criminality, and part not. "The punishment is mine," is an expression which has been relied upon

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in the Argument, and justly relied upon. "Here I feel that everything is too good for me," and, "What do I deserve?—nothing," are passages which have been remarked upon, as showing a self-abasement of a kind which could only have arisen from a sense of guilt. Of this letter all I can say is, that I cannot come to the conclusion that it is a confession of absolute guilt. The terms in which it is couched are not sufficiently specific to bring me to that conviction with any degree of satisfaction. At the same time, I think the contents of the letter deserve very great weight and very great consideration in assisting the Court to arrive at its ultimate conclusion; but I guard myself against being supposed to consider the letter as a confession of guilt.

The 17th article pleads the residence of Mrs. Faussett at Edinburgh, in May, 1847, and that a child was born there on the 6th July. The scene is now entirely changed, and if the facts alleged in this article were established by evidence, the Court would have no difficulty in coming to a conclusion. [Read the article.]

Now, one of the witnesses upon this article is Mary Cumming, the person at whose house in Edinburgh Mrs. Faussett was lodging. Why, to my very great astonishment, I find in her evidence upon this article, that Mr. Arthur Trevelyan, the brother of the lady in question, and Mrs. Trevelyan his wife, were living in the same house at the time, and must have been cognizant of all the facts. No notice is taken of this in the plea, as if it were intended to conceal from the Court what must have been known to be a fact of importance in the cause. Here is a charge of Mrs. Faussett taking lodgings at Miss Cumming's, and of Mr. W. Trevelyan coming to see her there during that time, up to the period of her confinement and immediately after her confinement, and it turns out that, during all this time, nearly, the brother of this lady was residing in the house, and Mrs. Arthur Trevelyan too. In justice to the Court, this fact ought to have been pleaded. See what a different impression it would have made upon the mind of the Court if Mrs. Faussett had resided alone in these lodgings, and had been visited

there by Mr. W. Trevelyan, from what would be produced by her residing under the same roof with her own brother and his wife, for I cannot suppose he would be a pandar to the dishonour of his own sister. Miss Cumming says, the apartments had been taken for Mrs. Faussett, previously to her coming, by Mr. Arthur Trevelyan and his wife, the former of whom said she was his sister. "The apartments he and his wife took for Mrs. Faussett were a sitting-room and bed-room. The drawing-room and principal rooms on the floor were at that time occupied by some other ladies, who were about to leave, and Mr. and Mrs. Arthur Trevelyan engaged those apartments for themselves against the ladies' leaving, and about the 28th of the same month of May, after Mrs. Faussett had been in the house about a week, Mr. Arthur Trevelyan came into occupation of the said apartments; his wife joined him there shortly after;"—this was before Mr. W. Trevelyan came to Edinburgh;—"and from that time they and Mrs. Faussett remained in the apartments until shortly before the 12th August." After they had been there some time, the witness says, a gentleman used to come and visit there very frequently. "He did not visit Mr. Arthur Trevelyan, for he, we observed, always got out of the way at the time he called." This gentleman was called by Mrs. Trevelyan "Walter,"—so that there is no doubt about his identity. "We knew him by sight first by seeing Mrs. Faussett go out and join him in the street, two or three times, and after that he called at the house. He always asked for Mrs. Trevelyan, and used to be shown up into the drawing-room to her. Sometimes Mrs. Faussett would be in the room with her when he called; if she was not, Mrs. Arthur Trevelyan, on his coming, used to go and fetch her into the drawing-room, and then, after stopping in the room with them a short time, she would come out and join her husband, and they then went out, and did not use to come back till shortly before dinner-time, about which time the other gentleman used to leave." Why, this is startling. The husband and wife were separated on account of her supposed adulterous connection with Mr. W. Trevelyan, and the next thing I

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find is the brother of the lady and his wife taking up their residence with her, and when Mr. W. Trevelyan comes there, he is received by Mrs. A. Trevelyan, who goes and fetches Mrs. Faussett to Mr. W. Trevelyan, and leaves them together in her own apartments. There may be some explanation of this ; but I should have been guilty of a gross dereliction of duty if I had not noticed and commented upon this circumstance, and shown that it had not escaped the vigilance of the Court. Assuming the evidence of Mary Cumming to be true, this was neither more nor less than actually introducing the paramour, affording him opportunity and giving him access to her. "He used to come usually between one and two in the day, and stop till about half-past five, and during that time he and Mrs. Faussett would be alone together." All this is extremely strange, and calculated to increase the surprise existing in the mind of the Court. It appears that Mr. W. Trevelyan was with Mrs. Faussett on the very day of and just before her confinement, and that he visited her the third day after, and Mrs. A. Trevelyan therefore knew that Mrs. Faussett kept her room ; and the witness says, "We knew that, on that occasion, and on repeated occasions after that, during the time that Mrs. Faussett kept her room, he left the drawing-room, and was in Mrs. Faussett's sitting-room. We did not exactly know that he visited Mrs. Faussett in her bedroom on these occasions, because we did not go in there while he was there ; but there was no doubt that he did, because we used to observe that Mrs. Faussett's maid was always sent out for something or other, at the time he used to be coming to the house then, and frequently, on the house-bell ringing, we saw him come hurriedly out of Mrs. Faussett's sitting-room, between which and her bedroom there was a door of communication."

Nor is this the only witness upon this article. There is the evidence of Margaret Martin, servant of Miss Cumming, whose testimony it confirms to a certain extent. She says Mrs. Trevelyan used to call the gentleman who visited her there "Walter Trevelyan ;" that when he called, the witness asked him up to her, in the drawing-room (her sitting-

room), where Mrs. Faussett would be sitting; and that several times, after the latter's confinement, she has seen Mr. W. Trevelyan come out of Mrs. Faussett's sitting-room, her bedroom, where she was in bed, communicating by a door with the sitting-room.

This is the evidence of these two witnesses; but even this evidence does not go to prove the commission of adultery at this particular period; indeed, there is nothing in the evidence upon this article which would justify me in saying that adultery was actually committed at Edinburgh. Yet the facts are of very great weight, for it is scarcely possible, with evidence of such an intimacy between the parties, at such a period, about the time of this lady's confinement, and immediately after, not almost of necessity to be led to the conclusion that a criminal intercourse had taken place between them at some time or other. With regard to the presence of Mr. and Mrs. A. Trevelyan, I am not justified in rejecting the evidence of Mary Cumming and Margaret Martin altogether, and imputing to these two witnesses that they have deposed contrary to the truth, because their evidence would tend to reflect upon the conduct of those persons. It is surprising to the Court that they have not been made witnesses in the cause. I am unable to account for their not being made witnesses; they would have been the best witnesses in the cause. Whether it arose from any particular delicacy, or any other reason, I know not; but I should not be justified in rejecting the evidence of Cumming and Martin solely on the ground that I cannot explain the conduct of Mr. and Mrs. Trevelyan.

Nothing, I believe, now remains for the Court to consider but what occurred at the christening, which involves a question of law, and law alone. The substance of the 18th article is, that Mrs. Faussett, being desirous that the child should be christened, directed Mrs. E. Trevelyan to make arrangements for that purpose, and that at the time of the christening Mrs. E. Trevelyan stated to the Rev. Mr. Alexander that the child was illegitimate, her own son being its father, and consequently that Mrs. Faussett had committed adultery. It is alleged that the declaration made by Mrs.

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Declaration of A to B, touching the guilt of the wife, not pleaded to have come from the wife;

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E. Trevelyan is evidence against Mrs. Faussett; but it is to be recollected that what passed between Mrs. E. Trevelyan and Mr. Alexander, to which the latter has deposed, was not in the presence of Mrs. Faussett.

The question is, whether, in any point of view, the Court can receive this evidence. It was argued that this evidence is to be assimilated to the declaration of an agent against his principal, acting within the scope of his authority, and cases were cited to show that declarations made by an agent in transactions of business for his principal may be evidence against his principal, when the agent was acting within the scope of the authority given to him. In this case, it is argued that, as Mrs. Eliza Trevelyan was agent as to the christening, *ergo* her declaration ought to be received against Mrs. Faussett. I admit the general principle, but I totally deny its applicability to the present case. On what principle is the declaration of an agent received as evidence against his principal? Simply to affect his pecuniary responsibility, in civil cases, such as contracts for buying or selling of goods, where the declarations of an agent are and ought to be received as evidence against his principal, whether they be true or false. But here the inquiry is of a totally different kind. It is true, this is not a criminal proceeding, to lead to any punishment of the nature of fine or imprisonment; nevertheless, in every suit for a divorce by reason of adultery, it is a question of guilty or not guilty of a crime. What is the reason why the declarations of an agent are received as evidence against his principal with reference to his pecuniary responsibility? Because such pecuniary responsibility may attach with perfect justice whether the declarations of the agent be true or false. Take it that they are false; why, their falsehood would not exonerate the principal for the acts of his agent within the true scope of his authority: all that is to be ascertained is, whether the declarations were made by the agent, and the responsibility of the principal follows, without reference to their truth. But it is a different thing here; this Court looks to the truth of declarations. If Mrs. Faussett had instructed Mrs. Eliza Trevelyan to tell Mr.

Alexander that the child was the offspring of an adulterous intercourse, it might have been so pleaded and proved as a declaration of Mrs. Faussett herself, and it would have been the best possible evidence against her. But it is not so, and therefore the conclusion is that Mrs. E. Trevelyan could not prove that this was said by Mrs. Faussett; so that it did not emanate from Mrs. Faussett herself, but was an inference drawn by Mrs. E. Trevelyan, of which part might be true and part false; so that it is utterly impossible, upon the ordinary principles of these Courts, to receive the declaration of Mrs. E. Trevelyan as evidence against the party in the cause, and I am bound to reject the whole of this evidence.

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Before I come to a conclusion, one or two circumstances I wish to remark upon. In the first place, there has been no verdict in this case, which is unnecessary as proof of the adultery; it is only good *alio intuitu*. [*Phillimore*.—I understand, judgment has gone by default; so that there has been a sentence.] I am of opinion that a verdict is no proof, and not to be received as proof, of the adultery. The only effect of it is this: to show that the husband was not afraid to expose his witnesses to a *vivâ voce* examination. But as to the effect of a verdict at common law, it is *res inter alios acta*. Then as to the delay in bringing the suit, I am of opinion that it is satisfactorily accounted for.

The question then is, whether, upon the whole of this evidence, I can pronounce the adultery to be proved? I cannot conscientiously say that any act of adultery is proved with reference to any particular time and place; but I can say that there were ample opportunities for the commission of adultery if the parties were so disposed; and I can say that great and most undue familiarity, totally incapable of being justifiably accounted for, is established by the evidence; that, taking all the facts together, at Seaton Carew, at Cropthorn, at Edinburgh,—remembering too the letter,—and looking at all the conduct of the parties, I have come to the conclusion, though with great difficulty, that I am justified in pronouncing for the separation.

I must say, I think that evidence which the Court had a

inadmissible
as evidence
against the
wife.

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right to expect, as to the origin of the acquaintance and as to the proceedings at Edinburgh, has been withheld,—I will not say wilfully,—for no reason that I am aware of, for no explanation is given in the evidence. It may be that this case will travel further, and that Mr. Faussett will seek a more adequate remedy than this Court can give him in the House of Lords. If it should be so, I think Mr. Faussett will have no reason to regret the pains I have bestowed upon it here, endeavouring to show that moral conviction is adequately supported by legal evidence, rejecting that which in my judgment is manifestly not legal evidence, and on which if I had relied, the whole case might have been seriously prejudiced elsewhere. I pronounce for the divorce. [*The Registrar.*—The Court rejects the evidence on the 18th article?] Yes, the whole of the evidence on the 18th article.*

Proctors :—*Loveday*, for the husband ; *Farquhar*, for the wife.

Prerogative Court of Canterbury.

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A marriage between British Protestant subjects domiciled at Demerara, solemnized at the island of St. Lucia, accord-

WARD AND CODD v. DEY.—*Cause.*—This was a business of proving the will of Shirley Elizabeth Dey, formerly of Demerara, in British Guiana, but late of Lambeth, Surrey, promoted by the executors therein named, against William Dey, her husband, whose interest as such was denied by the executors, by whom the validity of the mar-

* Before the House of Lords, in the proceedings on the Divorce Bill (which was read a second time on the 17th July), Mr. Dixon (in whose house, at Seaton Carew, Mrs. Faussett took lodgings in September, 1846) was examined, and directly proved an act of adultery, which evidence would have been extra-articulate, and inadmissible, upon the 5th article of the Libel, as it stood, which did not plead adultery.

riage was disputed. The deceased died 18th June, 1845. The will, which was made in her maiden name, "Fraser," bore date the 7th June, 1845.

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The interest of the husband was propounded in an Allegation, which pleaded the fact of marriage, Mr. Dey being a bachelor and the party deceased a spinster, on the 10th November, 1837, at the parish church of Castries, in the island of St. Lucia, according to the rites and ceremonies of the Church of England, by a minister in Holy Orders of that Church, in pursuance of a License duly obtained, and the entry of the marriage in the register-book of that parish, to the following effect: "William Dey, of the colony of Demerara, and Shirley Elizabeth Fraser, spinster, of the same colony, were married in this church, by License from His Excellency Thomas Bunbury, Esquire, Colonel, administering the government, this 10th day of November, in the year of our Lord 1837, by me, S. A. F., officiating minister of Castries;" the cohabitation of the parties, first at Barbadoes, and afterwards at Demerara, until July, 1838, when Mrs. Dey left her husband; and their reputation as husband and wife. The admission of this Allegation was opposed, but it was ultimately admitted by the Court.*

A responsive Allegation by the executors, which was admitted without opposition, pleaded that the party deceased was born the 1st July, 1823, at Demerara, her mother and reputed father being both of that colony, which she never quitted from the time of her birth until November, 1837, when (being little more than fourteen) she was prevailed upon by Mr. Dey, a journeyman cooper at Demerara (of which colony he was a native and domiciled inhabitant), to leave her mother, and embark with him on board a sloop for St. Lucia, where they were in fact married; that by the laws and ordinances then in force for the regulation of marriages at St. Lucia, no marriage in general could be contracted there, so as to be good and valid in law, without due publication of banns first made on three several occa-

ing to the rites and ceremonies of the Church of England, by a minister in Holy Orders of that Church, without the formalities required by the general law of the island, under a License from the Governor,—held, upon the evidence of persons skilled in the law of the island, to be conformable to the *lex loci*, and therefore a good and valid marriage.

* 5 Notes of Ca. 66; the name "Dey" being erroneously printed "Day."

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A further Allegation was brought in, on the part of the husband, which pleaded that, for some time prior to November, 1837, Mr. Dey, with the approbation of her mother, paid his courtship to the deceased, who agreed to be married to him, and the preparations for leaving Deme-

rara for their marriage were with her full concurrence ; that she had left her mother's residence, and sought the protection of other persons, some time prior to her departure from Demerara, and without reference to her engagement to be married, and she embarked of her own free will ; that, after their marriage, the parties proceeded together to Barbadoes, from whence they returned, in January, 1838, to Demerara, where they were received and acknowledged by the deceased's mother and others as husband and wife ; that by the laws and ordinances for the regulation of marriages in force at St. Lucia, at the time, a marriage between Protestants by License from the Governor, solemnized by a minister in Holy Orders of the Church of England, in the presence of two witnesses, is valid to all intents and purposes, without publication of banns, or the consent, or any of the formalities, set forth in the adverse Allegation, and at the time of the marriage, Mr. and Mrs. Dey were Protestants ; that whatever formalities may have been required, at the time of the marriage, according to the laws and ordinances in force at Demerara, for the due performance and validity of marriages solemnized in that colony between natives resident there, a marriage solemnized according to the laws, usages, and customs of the place wherein it was solemnized, and valid according to such laws, usages, and customs, is good and valid to all intents and purposes, and that the marriage in question, having been solemnized at St. Lucia according to the laws, usages, and customs then in force at that island, is a good and valid marriage to all intents and purposes.

This Allegation was admitted after opposition.

Sir J. Dodson, Q.A., and Dr. Jenner, for the husband.— **ARGUMENT.**

There is no doubt as to the fact of marriage ; that it was solemnized by a minister of the Church of England, in virtue of a License from the Governor of the island of St. Lucia, and there is no dispute that the parties were Protestants. The presumption of the law is always in favour of marriage, and when there is a fact of marriage, attended by all these circumstances, the presumption is strengthened, and a party who undertakes to set aside such a marriage must

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JUNE 19. *Ward v. Day.* prove beyond the possibility of doubt that, by the *lex loci*, it is invalid. The only question, then, is, what is the marriage law of the island of St. Lucia, and whether the marriage in question is in conformity to that law? and our witnesses establish the affirmative.

Dr. Addams, for the executors.—The law of marriage in St. Lucia, according to Mr. Burge,* is governed by the law of France before the Revolution. Then, is this a marriage which would be good by the law of France before the Revolution? That question answers itself, for this was a marriage solemnized by a minister of the Church of England, according to the rites and ceremonies of that Church. It is said, *semper præsumitur pro matrimonio*; but here the marriage was in violation of the rights of the mother. In Roman Catholic countries, it is not sufficient that the marriage is solemnized by a minister in Holy Orders of the Church of England. In *Lockwood v. Lockwood*,† *Dr. Lushington* said “he was not aware of any instance in which a marriage celebrated abroad, in the dominions of a foreign prince, had ever been pleaded to be a good and valid marriage, unless it was according to the *lex loci*, or had been solemnized in the house of the British ambassador or minister of some sort. Here was a marriage solemnized at Rome, by an English priest, between two English Protestants; and how that could be a good and valid marriage by the *lex loci* he was yet to learn.” In *Ryding v. Smith*,‡ *Lord Stowell* observed: “The marriage took place at no great distance of time from the compelled surrender. This case, therefore, has no resemblance to the case of Ireland, the Isle of Man, the plantations, or even Minorca, where recognized civil governments had been established, and a permanent system introduced, of which all must be supposed cognizant.” This case is with us. “The Cape was conquered, but not ceded, and it remained for a treaty of peace to decide to whom it was to belong. The ancient civil sovereignty was suspended, and no other fully established in its place.”

* Col. Law, 1 Vol. 124.

† 3 Mo. Law Mag. 278.

‡ 2 Hagg. C. R. 388.

Dr. Twiss, on the same side.—The principle upon which marriages are held to be valid or invalid is twofold; they must be solemnized either according to the law of the country to which the parties belong, or to that of the country where they were living. The parties in this case belonged to Demerara, and they were married at St. Lucia. Although the governor of that island might give permission to the parties to do an act of this sort, his License does not make the marriage good. If the marriage is to be good, it cannot be so by the law of the place; it must be by the general law.

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This question lies in a narrow compass. The title of the husband to administration depends upon the validity of the marriage; if it is valid, the deceased had no right to make a will; on the other hand, if the marriage is invalid, she had the power of disposition over her property. The question, therefore, is, the validity or invalidity of the marriage, which must be determined by the facts admitted in the cause, and the effect of the evidence.

In support of the law as pleaded on behalf of the husband, Mr. Atthill, the Attorney-General of the island of St. Lucia,—a person well qualified to instruct the Court as to the law of the island,—says, “I am clearly of opinion that, by the laws and ordinances for the regulation of marriages in the island of St. Lucia, in force at the time of this marriage, a marriage between persons professing the Protestant religion, had and solemnized in pursuance of a License from the Governor of the island, by a minister in Holy Orders of the Church of England, or officiating as such, in the presence of two witnesses, is a good and valid marriage to all intents and purposes, without publication of banns, or any of the formalities referred to in the adverse Allegation; and assuming as a fact that, at the time of the marriage in question, Mr. and Mrs. Dey were members of the Protestant Church, and that the marriage was had and solemnized as pleaded, I have no doubt that such marriage was and is a good and valid marriage, to all intents and

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to the *lex loci*.

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Another witness examined on the same Allegation is Mr. La Caze, the acting Chief Justice of St. Lucia, a person well capable of informing the Court as to the law of the island. He says: "I am clearly of opinion that, by the laws for the regulation of marriages in the island of St. Lucia, in force at the time of the marriage, a marriage between persons professing the Protestant religion, had and solemnized in pursuance of a License from the Governor or officer administering the government for the time being, by a minister in Holy Orders of the Church of England, or officiating as such, in the presence of witnesses, is a good and valid marriage to all intents and purposes, without publication of banns, or the consent, or any of the formalities, set forth in the article of the Allegation now read to me." Here again is an unhesitating opinion from the acting Chief Justice of the island, confirming the opinion of the Attorney-General, that such a marriage would have been a good and valid marriage, to all intents and purposes, in 1837, at St. Lucia. This is the testimony as to the law on behalf of the husband, claiming the property of his wife.

On the other hand, witnesses have been examined to show that it is not a good and valid marriage according to the law of St. Lucia. The first is Mr. Reddie, the late Chief Justice of the island; and he says: "I am of opinion that, by the laws and ordinances in force in the year 1837, and still in force, for the regulation of marriages in the island of St. Lucia, no marriage in general could be contracted so as to be good and valid in law, as contracted in conformity with such laws and ordinances in force in the said island, if contracted without due publication of banns first made upon

three several occasions (feast days), at competent intervals, unless under dispensation accorded by the authorities of either the Church of England or the Roman Catholic Church,"—which shows that there was a power of dispensation somewhere, and here it was exercised by the Governor of the island, who issued the License: "and unless such marriage shall have taken place in the presence of at least four credible witnesses, and with the consent first had and obtained of the mother of the woman, if under age and illegitimate." That is the general law of the island; but he had said, "unless under dispensation accorded by the authorities of either the Church of England or the Roman Catholic Church," according to the religion of the parties, whether Protestants or Roman Catholics. But he goes on: "What may be the requisites upon which the dispensations I have mentioned could be legally obtained, I am not competent to say." Therefore, he gives no opinion upon that point. Now the Attorney-General and the Chief Justice have given an opinion that the License in this case is a good and valid dispensation. This witness adds: "I am not competent to speak to the Ecclesiastical Law of either Church. In my official capacity of Chief Justice, I had no Ecclesiastical jurisdiction in the island of St. Lucia. I did not take cognizance, therefore, or entertain the question, of the validity of any marriages in the island except those by civil contract, leaving it to the Courts of the respective Churches to decide as to the validity of their own marriages." So that he gives no opinion as to the law affecting marriages in the island other than those by civil contract. "There were no Ecclesiastical Courts," he says; "there was no Ecclesiastical jurisdiction at all, in the island. I judge what I have described above to be the requisites to the validity of a marriage such as I have referred to in the island of St. Lucia, they being the regulations prescribed in respect of all marriages as fixed by the laws and ordinances then and still in force in the island in respect to marriages of Roman Catholics in the island, being the Edicts of the Kings of France: no part of the law of the Ecclesiastical Courts of England having been as yet introduced so as to have effect in the island of St. Lucia." He adds: "I would observe

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Ward v. Day. in the terms of the said Edicts,—as not void, but voidable by competent authority, such authority not existing in the island.” So that they are only voidable, not void, and are, therefore, good until avoided by competent authority. I do not see that the opinion of Mr. Reddie is contrary to the opinions of the Attorney-General and the Chief Justice.

Another witness, Mr. Norton, a barrister, speaks to the marriage-law of Demerara, having administered the law there as puisne judge in that colony.

Another gentleman who has been examined on behalf of the executors is Mr. Gabriel Agostini, at present in the employ of a commercial house in the city of London, but intending to follow the occupation of a professor of literature; he is a member of the bar of St. Lucia, and formerly practised there, and in 1835 was appointed Attorney-General. He says that by the laws and ordinances in force for the regulation of marriages in the island in 1837, no marriage in general could be contracted there, so as to be good and valid, without due publication of banns first made, unless dispensed with as pleaded in the Allegation, and without the consent and forms there set forth; that “such consent of the parent or recognized parent could only be dispensed with upon a formal process before the Royal Court of (what are termed) *Soumissions respectueuses* being made, by which process, upon notice, the parent is compelled to state the grounds of refusal; upon the insufficiency of which grounds the Court takes upon itself to decide; that must be a process anterior to the marriage. The law, regulating the question of marriages solemnized on the island to the effect above stated by me, will be found in the *Coutume de Paris*, and in the Ordinances of France of 1667, and some other Ordinances of the kings of France; and these laws, having been previously prevailing in the island, were recognized and confirmed as the still existing and future laws of the island, under the authority of the British Government, by a Proclamation of Brigadier-General George Prevost, in July, 1800, which is duly recorded in

the Royal Court of the island, and will be found in the Code de la Martinique, vol. v.; and such laws have been ever since and are still recognized as the law regulating questions of marriages in the island of St. Lucia." But this is no negative to the opinion of those gentlemen who depose to the validity of a marriage between British Protestant subjects according to the rites and ceremonies of the Church of England, by a minister of that Church, under a license from the Governor of the island. He states the general law of St. Lucia; but a dispensation might be had from that law; he does not say that a dispensation might not be obtained, or that the license of the Governor is not a good and valid dispensation. I do not apprehend that the opinion of this gentleman is in any degree contrary to the opinions of the Attorney-General and the Chief Justice.

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The other witness is Mr. Bent, Secretary to the Chief Justice of British Guiana, having previously been an Advocate of the Bar of St. Lucia. He says, the prevailing law of the island, up to the time he left it (in 1836), was the old French law, and in his opinion, according to the laws in force there for the regulation of marriages up to that period, a publication of banns, and in case of minors, the consent of parents, and in case of persons born out of wedlock, of the mother, were essential to the validity of a marriage in that island, according to the *lex loci*, and that such publication of banns could not be dispensed with but with consent of parents, or the next of kin, or guardians. "I am of opinion," he says, "that a marriage had in the island of St. Lucia under the circumstances articulate,—in the absence, that is, of due publication of banns, and of consent on the part of the parent, or next of kin, or guardian, the female being a minor,—is not a good and valid marriage according to the *lex loci*. I do not know that marriages were ever had by license in the island of St. Lucia; I do not know what authority existed there for the granting of marriage licenses." So that he knows nothing at all upon the point as to whether marriages could be had by virtue of a license; his opinion does not, therefore, go the length of contradict-

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The result and effect of the evidence is,—without going into the general question as to marriages conformable to the *lex loci*,—according to the opinion of the Chief Justice and the Attorney-General, this is a good and valid marriage, and I am of opinion, as far as the evidence goes, that the Marriage valid. marriage had and solemnized between these parties is good and valid according to the *lex loci*, and being so, it is good and valid everywhere else. I pronounce, therefore, that the husband has proved his case.

Proctors:—*Longden*, for the executors; *Wadeson*, for the husband.

A will, which, at the date of its execution, was deposited with the drawer, and a year before the death of the deceased, was, at his request, delivered to him to reconsider, and was found after his death in his bureau, locked up, with the first sheet, containing the substance of the will, detached and missing:—*Held*, on the presumption of law, that it was done by the deceased *animo revocandi*.

WILLIAMS v. JONES.—Cause.—This was a business of granting administration of the effects of William Williams, who died 7th January, 1848, promoted by Anne Williams, widow, relict of the deceased, against John Jones, one of the executors named in a will of the deceased, who left behind him, besides his widow, several nephews and nieces. On the 16th October, 1845, he made and duly executed his will, whereof he appointed William Owen, solicitor (who prepared the will), and John Jones, executors. On the 20th November following, having purchased some freehold property, he made a codicil to his will, whereby he devised the same to his wife in fee. Mr. Owen retained possession of the will and codicil from the times of their execution until about a year before the deceased's death, when, at his request, he took them to the deceased's house and left them with him. Soon after the deceased's death, the will and codicil were found in a pigeon-hole in a bureau in the deceased's parlour (being the place where they were deposited by the deceased, when left with him by Mr. Owen), but the first sheet of the will had been detached and removed. The widow prayed administration, alleging that the deceased had died intestate. Mr. Jones, one of the executors, propounded the will and codicil, in an Allegation, which pleaded that

the death of the deceased was sudden ; that when the will and codicil were left with him by Mr. Owen (pursuant to his verbal request, communicated by Mrs. Williams), the deceased said to Mr. Owen that " he wished to reconsider his will, as to the disposal of his real estate, as he doubted whether he had not given his nephew John Lloyd too much ;" that in November, 1847, an intimate friend of the deceased, and one of the attesting witnesses to his will, saw him at his house, and in the course of their interview, the deceased said " he should like to make his will so that the parties interested under it could not make away with the property ;" adding, " perhaps I have left too much to the same person ;" that, in other respects, the deceased never expressed any doubts or misgivings as to his will, or any wish or intention to alter it, and in various conversations with intimate friends, down to within a very short period of his decease, he spoke of his will in terms of approbation, as a subsisting will ; that he was at all times on the best and most affectionate terms with his nephew, John Lloyd, whom he always spoke of very highly ; that he was on no terms of intimacy with his heir-at-law, or (excepting John Lloyd) with his next of kin ; that the first sheet of the will, now missing, contained an appointment of executors and trustees, the devise of his real and personal estate upon trust, the former to be enjoyed by his widow during life or widowhood, then to go to John Lloyd absolutely ; the personalty to the use of his widow during widowhood ; and the Allegation prayed probate of the will with the first sheet supplied from the draft.

In her Affidavit of Scripts, Mrs. Williams (the widow and party) stated that, two days after the death of her husband, Mr. Owen (who was a trustee) called at the house and asked her for the will, which she believed was in his possession ; but upon Mr. Owen stating that he had seen the deceased deposit it in a pigeon-hole of his bureau, she obtained the key, and, unlocking the bureau, they found the last three sheets of the will and the codicil ; that she has since made diligent search amongst the deceased's papers for the first sheet of the will, but has not been able to find the same,

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and verily believes that the deceased must have removed and destroyed the first sheet.

Dr. Addams, for the executor.—The question for the Court to determine is, which is most probable, that the testator detached the sheet and destroyed it *animo revocandi*; or that it has been detached accidentally by him, or by some other person, but with no intention on his part to revoke it. If he had intended to revoke the will, he would have destroyed the last sheet, not the first.

Dr. R. Phillimore, on the same side.—The question is, whether the circumstances of the case do not repel the presumption of law; whether reason and moral conviction do not lead to the presumption that the testator adhered to the will. *Saunders v. Saunders*.^{*} *Welch v. Phillips*.[†]

Sir J. Dodson, Q.A., for the widow.—The first question is, by whose act it was that this part of the will was destroyed; and, according to every legal presumption, it was the act of the deceased himself. The second point is, the effect of that destruction. The most important part of the will having been destroyed, and by the deceased, the presumption is that he intended to destroy the whole will by thus taking away the substance of it. The oral evidence of declarations is not to be relied on; they may not have been made with sincerity, or they may have been misunderstood, or not remembered with accuracy.

Dr. Jenner, on the same side.

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Under the circumstances of this case, I have no doubt as to what the decision of the Court ought to be. It is a very unfortunate case for John Lloyd, for I do not believe it was the intention of the deceased to deprive him of all the property he would have taken under the will, and put him on a par with the other relations, for it is clear that he continued on terms of friendship, and regard, and intimacy with him. But I am afraid the law in this case will compel the Court to pronounce against the papers.

^{*} 6 Notes of Ca. 518.

[†] 1 Moo. P.C.C. 299.

The circumstances of the case are these: the deceased left a widow, and nephews and nieces, one of the former being his heir-at-law, and John Lloyd being another nephew. By his will, he devised his real estate in trust for his widow during life or widowhood, and upon her death or remarriage, for John Lloyd, in fee; and his personal estate he likewise gave to John Lloyd after the death of his wife. But it turned out, after the death of the deceased, when the will was found in his bureau, where it had been deposited some time before, that the first sheet of the will was missing. Now the account given by Mr. Owen, the drawer of the will, and confidential solicitor of the deceased, is that the will, upon its execution, remained in his possession till about a year before the death of the deceased, when he delivered it to him at his request. He says, "he told me to do so one day when I went coursing there on the deceased's farm; he said, 'I want you to bring over my will, because I want to read it at my leisure, and to reconsider it.'" So that there was an intention on the part of the deceased to reconsider his will, and he requested it might be delivered to him by his solicitor in order that he might reconsider it. He goes on to say that he took the will and codicil in either December, 1846, or January, 1847, to the deceased. "I had them," he says, "enclosed in an envelope and sealed. I tore open the envelope in his presence, and took out the will and codicil, unfolded them, and offered to read the will to him, for he was not a very literate man. He replied, 'No, I do not wish you to read it; I can do so at my leisure. I wish to reconsider it, as I think I have given my nephew John Lloyd too much.'" Therefore, there was an intention on his part to reconsider the will, and with reference to what he had given to John Lloyd under the will, which the deceased thought was too much. "He expressed himself in Welsh: I do not recollect his mentioning anything about his real estate, or that he made any distinction of that sort."

The will was, therefore, transferred by Mr. Owen to the possession of the deceased, and being in his possession, the presumption of the law from its destruction, in whole or in

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part, is, that it was destroyed by the deceased himself, and without proof to the contrary, that, if done by the deceased, it must have been done *animo revocandi*. For what other purpose could he have done it? The sheet missing may be considered as containing the whole trusts of the will, so that the destruction of the first sheet was the destruction of the substance of the will, and it could be done with no other intention (supposing it to have been done by the deceased) than to revoke that will. If he had any other intention, how can it be made apparent? There can be no doubt that, if proved to be the act of the deceased, and not proved to have been done accidentally or inadvertently, it must be held to be a cancellation *animo revocandi*. Who could have had access to the will who had an interest to destroy it? Mrs. Williams had no interest to destroy the will, for the real estate, which, without a will, would go to the heir-at-law, is worth £80 or £90 per annum, and the personalty does not exceed £280, subject to a specialty debt of £100: so that her interest under the will was greater than under an intestacy. It is proved that none of the deceased's relatives besides John Lloyd were on intimate terms with him, and therefore none of them could have had access to the bureau, and it is very improbable that any other person should have destroyed the will whilst it was in his possession.

Declarations.

Then how is the presumption proposed to be repelled? By declarations of the deceased. Now testamentary declarations are considered of little weight; they may be insincere, or they may be misunderstood, or misremembered, and not repeated in the very words of the deceased. The witnesses may have misunderstood what he said of John Lloyd, or very possibly the deceased may have said so, and he may have intended to make a new will, and very possibly the sheet removed would have been a part of the new will. There is a conversation spoken to by John Davies, a servant of Mrs. Williams, and a declaration by the deceased on the 5th January, 1848 (two days before his death), which seems to have made an impression on the mind of the witness, who was not examined until February, 1849: "On the Wednesday before the deceased died, I was in the field,

a few yards from the plantation, the deceased's farm, and coming out of the plantation with the deceased, when he said to me, 'John Lloyd does not please me well, but it will be a good thing for him to have this place after me, for he has a great many children.'" The witness says he understood the deceased to mean that John Lloyd would possess the land by his will; "but he did not mention the will in any other terms to him upon that or any other occasion." No reference to the will or codicil; but "it will be a good thing for him to have this place after me." There must have been something else that passed.

But it is not possible for the Court to rely upon declarations. The declarations here are all one way certainly, in favour of John Lloyd; but though all one way, they will not destroy the presumption of law arising from these facts, namely, that the paper was in the possession of the deceased, under lock and key, and that no person could have had access to the paper who had any interest to destroy it. To what conclusion, then, can the Court come, but that it was the act of the deceased himself, possibly with the intention that the sheet should form part of a new will? But that would not do; unless the deceased destroyed the will under the impression that he had another will, that circumstance would not be sufficient to do away with the intention of the deceased to destroy the will. There have been cases in which the Court has come to a different conclusion from the probability that the paper was destroyed by another person than the deceased *animo revocandi*. In *Saunders v. Saunders*, as in other cases, there were strong grounds of suspicion, and the Court came to the conclusion that it was not the act of the deceased, being guided by circumstances which showed how extremely improbable it was that the deceased should have destroyed the will, and how probable it was that it was the act of other persons, whose interest it was to do it.

Upon the whole, I am of opinion that the presumption of law has not been repelled. It may have been the intention of the deceased to make another will, but that will not do if

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JUNE 19. he destroyed the paper *animo revocandi*. I, therefore, pronounce against the validity of the will.

Williams v. Jones.

Proctors:—*Heales*, for the widow; *Townsend*, for the executor.

High Court of Admiralty.

4th Sess.

JUNE 20.

Collision — THE “SHAMROCK” (BURBIDGE).—Motion.—This was Practice. — originally a cause of damage, in which the owners of a Where the schooner, called the *Thwaites*, sought to recover the value of amount of damage had been their vessel, which had been run down by the brig *Shamrock* referred to the Registrar and off Dungeness. The Court, assisted by two Elder Bre- Merchants, thren of the Trinity House, pronounced (February 20th) for who reduced the claim of the the damage, with costs, and referred the amount to the plaintiffs from Registrar and Merchants. The owners of the schooner gave £1,375 to £800, in a claim for £1,375. 9s. 11d.; the Registrar returned only their Report £800. 13s. 9d., taking off £574. 16s. 2d. This Report was being confirmed, the Court, on Motion, confirmed on the 12th June. condemned the

plaintiffs in the costs of the Reference.

Dr. Addams, on behalf of the owners of the *Shamrock*, now moved the Court to condemn the other party in the costs of the reference, contending that, if the claim had been moderate, the owners of the *Shamrock* might have paid it, and thus saved the expense of a reference.

Dr. Phillimore, for the owners of the schooner.—The reference was a matter of course. This objection ought to have been set forth in an Act on Petition; the Court would not decide such a question on Motion. The principal deduction by the Registrar and Merchants was a claim made by mistake.

JUDGMENT.

DR. LUSHINGTON.

The question is, as to the costs of a reference to the Registrar and Merchants, which, in all cases of damage,

is of necessity made. The ground of the Motion, to condemn the parties who have proceeded in the costs of the reference, is, that a very large sum was claimed and a comparatively small sum allowed.

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Shamrock.

The first point is, whether I ought to hear a question of this kind by way of Motion, or whether it ought to have been raised by an Act on Petition. Now I am not prepared to say that, in all these cases, it is necessary to proceed in the latter form: I think I shall presently give good reasons why it is not incumbent on the parties so to proceed. The only object of proceeding by an Act on Petition would be the investigation of all the circumstances of the case, in order to satisfy the Court that claims had been improperly advanced, and were of a nature not to be allowed. But when the Report is once confirmed, it must be taken that the Registrar and Merchants have done rightly, and I take no other view of the case than appears on the face of the proceedings. There are various grounds on which the items might be allowed, or disallowed, as the case might be. It might be that the demand was exceedingly exorbitant; it might be that some of the items arose from pure mistake, and that others in their nature were of a doubtful character. It does not follow, I think, that any moral blame attaches to a party simply because he advances a claim before the Registrar and Merchants which they consider cannot be received. But I am not to decide the case on such considerations; I am to decide it on this principle, that a very large amount has been demanded, and that it has not been supported. Whatever may be the cause why the demand has not been supported, the Court is not to inquire. I am not now speaking of a small amount; I never would deprive the party of costs where the variation between the sum claimed and the sum allowed was small in amount. The question is, whether, when it is very large, the Court ought not to adopt the course usually taken, namely, to condemn the party who made the claim in costs. What is the principle of costs? To indemnify the party put to the costs. It does not follow that a party condemned in costs in an ordinary suit has any blame attaching to him. He may

Form of proceeding.

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—
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Motion pro-
nounced for.

fail, having an excellent cause; he may fail because he has mistaken the law, or he may fail for want of evidence; but as the other party has been exposed to hazard, and as the law must inflict costs on one side or the other, it gives the costs to the party so exposed, without entering into questions of this sort. Supposing every one of these demands were not only *bond fide* made, but of a doubtful character, —a character which, in a moral sense, would justify the party who made the claim; if he fails, he is in the position of every other suitor who fails in his demand. In this case I shall pronounce for the Motion, and compel the party to pay the costs, for the reason clearly stated by Dr. Addams, that if the demand had been precisely what it ought to have been in the contemplation of the law, it might have been paid in the first instance; and the party must have been put to expense, more or less, to effect the reduction. Common justice induces me to say that, where there is so great a failure as £575 out of £1,875, the party effecting that deduction, so far from being saddled with costs, is, in justice, entitled to them.

Proctors:—*F. Clarkson*, for the brig; *Glennie*, for the schooner.

Prerogative Court of Canterbury.

4th Sess.

JUNE 22.

Practice. — **CULLUM AND CULLUM v. SEYMOUR.** — *Motion.* — This was a cause of proving the will of Anthony Seymour, promoted by the executors named in a will dated 27th June, 1848, against the widow of the deceased, sole executrix and universal legatee named in a will bearing date 1st September, 1848. *Dr. Harding*, on behalf of the executors, applied to the Court to dismiss from the cause John Cullum the elder, on an application

his renunciation of probate of the will in which he is named executor, for the purpose of enabling his wife to be examined as a witness in support of one of the articles of the Allegation given in by the executors, and admitted as reformed, wherein are pleaded certain declarations of the deceased in favour of the will of June, 1848.

Dr. Bayford, for the widow, opposed the application, citing *Arnold v. Earl*,* *Sanders v. Wigston*,† and *Panchard v. Wigon*.‡

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by a co-executor, party in the cause, to be dismissed, in order that his wife might be examined as a witness to prove a material fact,—rejected.

SIR H. JENNER FUST.

The circumstances of the case are these. On the JUDGMENT.

Bye Day after Michaelmas Term, 1848, Mr. Jennings appeared as Proctor for John Cullum the elder and John Cullum the younger, and alleged them to be executors named in the last will of the deceased, bearing date 27th June, 1848, and to have been duly sworn, and prayed probate to be granted to them. Mr. Pott appeared for Mary Seymour, widow, the relict, and alleged her to be the sole executrix and universal legatee named in the last will of the deceased, bearing date 1st September, 1848, and prayed probate thereof to his party. Both Proctors were assigned to exhibit proxies and bring in affidavits as to Scripts on the Caveat day. On that day, Mr. Pott exhibited proxy under the hand and seal of his party, with affidavit of Scripts. Mr. Jennings also exhibited proxies from his parties, and affidavit as to Scripts, and declared he opposed the will of September, 1848, which Mr. Pott propounded, and asserted on Allegation, which was brought in the 1st Session of Hilary Term, and was admitted without opposition on the 2nd Session; Mr. Pott being assigned to prove the 4th Session. Witnesses were produced and examined, and publication would have passed, but on the Bye Day, Mr. Jennings asserted an Allegation, which was brought in on the 3rd Session of Easter Term. On the 4th Session, Mr. F. Clarkson exhibited proxy from Mrs. Seymour, revoking the appointment of Mr. Pott as her Proctor, and appointing him (Mr. Clarkson) to be her Proc-

Dec. 14.

Dec. 28.

1849.

Jan. 16.

Jan. 25.

Feb. 22.

May 5.

* 2 Lee, 380.

† 5 Notes of Ca. 78.

‡ 1 Phill. 212.

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May 26.

June 14.

tor. The Allegation brought in by Mr. Jennings came on to be debated on the 1st Session of Trinity Term, when the Court directed the 4th and 5th articles to be reformed, and the Allegation, as reformed, was admitted on the 3rd Session. In this stage of the cause, the Court is asked to dismiss one of the parties, in order to allow his wife to be examined as a witness. Certainly, under the Statute,* the law as to the competency of witnesses is greatly altered from what it was: the Statute, in effect, declares that no interest, great or small, shall be a bar to the competency of a witness, unless a party named in the record. This Court is not a Court of Record; but it has been held, in *Sanders v. Wigston*,† that the Act applies to this Court. But in that case, the parties had taken no step in the cause; they had been cited, but did not appear, and the cause went on against them *in pœnam*. Still it was held to be necessary that they should be dismissed before they could be examined, and Sir George Lee's Cases, and particularly the case cited by Dr. Bayford, of *Arnold v. Earl*, were referred to, and it was held to be absolutely necessary to dismiss the parties, in order to render them competent witnesses, for, being parties in the cause, they could not be examined as witnesses, notwithstanding Lord Denman's Act. But in this case, not only has the party propounded the will, and brought in an Allegation, in conjunction with his co-executor, but their Allegation has been debated, and he defended, by his Counsel, the admissibility of the 11th article, pleading the fact which his wife is to prove, and the Allegation was directed to be reformed, and was afterwards admitted as reformed; and at this advanced stage of the cause the Court is asked to dismiss this party in order that his wife may be examined as a witness. I am not aware of any case applicable to this, and I am of opinion that the Court ought not to dismiss the party, and that I must reject the Motion. The party should have thought of this before, especially as the fact, of the declaration of the deceased to Mrs. Cullum, is pleaded in the Allegation. After this Allegation has been admitted, the

* 6 & 7 Vict. c. 85.

† 5 Notes of Ca. 84.

party asks to be dismissed, that his wife may prove this material fact. I reject the Motion.

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Cullum v. Seymour.

Proctors:—*Jennings*, for the executors; *F. Clarkson*, for the widow.

IN THE GOODS OF WILLIAM BAYARD, DEC.—*Motion, Administration.*—Where administration *ex-parte*.—The testator, by his will, with thirty-one codicils thereto, appointed his wife, four of his sons, his brother, *de bonis non* had been granted to the attorneys of the surviving executor of the deceased, on the death of such executor (who resided in Nova Scotia, and whose will was proved there, and not in England), the chain of representation was not considered broken, and administration *de bonis non* was refused to one of the residuary legatees substituted, the executor's executors not being resident within the jurisdiction of the Court. and R. R., executors, and therein named his five sons and three of his daughters residuary legatees, and his daughter A. J., wife of B. J. (afterwards widow), residuary legatee for life, and substituted all and every her child and children residuary legatees in respect to her share after her decease. Two of the testator's sons, named residuary legatees and executors, died in his lifetime. In 1805, probate of the will and codicils was granted to R. B., the testator's brother, and R. R., then two of the surviving executors, power being reserved to the other surviving executors. Another of the sons and one of the unmarried daughters died without proving; and the two executors (R. B. and R. R.), who proved the will, having for some time intermeddled in the goods, died, leaving part unadministered. In January, 1829, administration, with will and codicils annexed, of the unadministered effects, was granted to G. R. and W. A. P., as the attorneys of S. V. B., the son and surviving executor named in the will, who was then residing in Nova Scotia, and who died in 1832, whereby the Letters of Administration of the unadministered effects of the testator so granted to his attorneys expired, some part of the goods of the testator still remaining unadministered. S. V. B. left a will, executed in 1828, whereof he appointed his two sons and his wife executors, all of whom resided in New Brunswick, and who in June, 1832, duly proved the will in Nova Scotia, but neither had as yet proved the same in this Court. All the residuary legatees and the residuary legatee for life (the testator's children) named in the will of the testator, William Bayard, were now deceased, and there was no representative of him under the authority of this Court. There was due

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Bayard, dec.

to the estate of the testator, as residuary legatee named in the will of his late son, J. B., deceased, a trust fund of £1,961 Three and a Quarter per Cents, with accumulations thereon, to obtain which a legal representative of the testator was required.

MOTION.

Dr. Jenner, for one of the children of A. J., widow, deceased (whilst living the residuary legatee for life named in the will), and as such one of the residuary legatees substituted in the will, moved for administration, with will and codicils annexed, of the goods left unadministered. The question is, what is the effect of a grant of administration to an attorney? If an executor dies without proving the will, as in this case, his executor is not an executor of the other's testator. Is probate granted to an attorney a grant to an executor? Is not the chain of representation broken? An attorney is only a sort of agent. *Wankford v. Wankford*.^{*} *Re Hind*.† *Re Bullock*.‡

DECREE.

SIR H. JENNER FUST.

I understand from the Registrar that there have been cases very similar to this, in which administration to the attorney of an executor has not been considered to break the chain of representation; that a will proved by an attorney of an executor is the same as by the executor himself. I confess it seems to me that it would not be proper for this Court to dispose of the interest of parties not being resident within the jurisdiction of this Court, and in their absence to decree administration to one of the residuary legatees substituted. I must reject the Motion at present.

Motion re-
jected.

W. G. Clarkson, Proctor.

* 1 Salk. 308.

† Prerog. C., 1824. Not rep. In this case, one of the two executors of the testatrix died, having proved her will, leaving effects unadministered; the surviving executrix proved the will by her attorney, and died intestate. Administration *de bonis non* passed in common form to one of the residuary legatees of the original testatrix.

‡ 1 Robert. 275. 4 Notes of Ca. 645.

FOLEY v. VERNON.—*Cause.*—This was a cause of proving the will (as contained in two papers, A and B) of Captain Osborne Foley, R.N., who died 9th August, 1848, promoted by his widow, sole executrix named in the will, against one of the sisters and next of kin of the deceased.

The paper A, written upon half a sheet of foolscap paper, and bearing date 23rd April, 1836, is headed, "Bequests which I wish my Mother to make for me to the following persons, my relations;" then follow various bequests, pecuniary and specific, the paper concluding, "and my Mother will keep the others in remembrance of me. Osborne Foley." This paper is unattested.

The paper B, which is written upon half a sheet of letter-paper, and bears date November 22, 1836, begins, "I Osborn Foley, &c. do hereby give and bequeath," and then follow certain bequests to his mother and his brother, and the appointment of the former as executrix, but there is no disposition of the residue. This paper is attested by two witnesses.

Both papers were found enclosed in the envelope of a letter which had been addressed to the deceased, bearing the post-mark of 3rd January, 1846, and upon which envelope the deceased had written "Sepulchral."

The question was, whether A, as well as B, was entitled to probate.

Dr. Deane, for the executrix.—The will is contained in the two papers. Under paper A, the mother would be executrix according to the tenour. The word "others" must be construed "others of the same kind," so that there is no disposition of the residue in that paper. B gives to his mother "all and every right I now possess, or hereafter may possess, in any property now accruing to me by my father's will, or my mother's marriage settlement." It cannot be contended that the date of the envelope brings these papers within the 34th section of the Statute, which extends only to wills re-executed, re-published, or revived after 1838. The paper A, when executed, was valid, and nothing has been done to it to render it inoperative. *Sandford v. Vaughan*.^{*} *Masterman v. Maberly*.[†]

^{*} 1 Phill. 47.

[†] 2 Hagg. E. R. 235.

Two testamentary papers of 1836, neither containing a complete disposition of the property,—the first informal, the second formal,—enclosed in an envelope dated in 1846. pronounced for as together containing the will.

JUNE 22. *Dr. Jenner*, for the next of kin.—B alone is entitled to probate. A is informal; it is merely a memorandum of bequests he wished his mother to make for him. It does not bequeath the residue, neither does B. The latter alone can be considered as his will; the other is a kind of direction to his mother. The papers must have been put together after 1846.

JUDGMENT.

SIR H. JENNER FUST.

The paper A is an informal paper, but it is testamentary, and would entitle the mother to act as executrix according to the tenour. But the other is a more formal paper, and contains an appointment of the mother as executrix. The question is, whether the last paper shall be pronounced for as alone containing the will, or both, as together containing the will.

Where there is a complete disposition of the property in each of two papers, they cannot be pronounced for as together containing the will; but where the disposition is partial, the Court, before the Statute, has pronounced for several papers as together containing the will. Is there any reason to suppose that the testator intended to revoke A? Undoubtedly not. He adhered to that paper, as shown by his depositing both papers in the same envelope. I am of opinion that the two papers do together contain the will of the deceased.

Proctors:—*Puckle*, for the executrix; *Neve*, for the next of kin.

Where the two subscribing witnesses to a will deposited that it was not signed in their presence, and that they did not subscribe in the presence of each other:—**BEACH v. CLARKE.**—*Cause.*—This was a business of proving the will of Martha Beach, wife of Richard Beach, promoted by him against the nephew of the deceased, sole executor named in the will, which bore date 5th August, 1847, and was made under and by virtue of the marriage-settlement of the deceased. The question was, whether the will had been well executed. The two witnesses were father and son. The former deposed that the deceased did not sign the will in his pre-

sence; that he subscribed the will when he was alone with her, and could not say with any certainty that her name was to the paper at the time, or that it was not: he was in a hurry. Upon interrogatory, he admitted that, when first questioned upon the subject, he had said he did not recollect having ever witnessed anything for the deceased, he had so entirely forgotten having so done. The son (who was at the date of the transaction about fourteen) was sure that the deceased did not sign the paper in his presence, or say anything to him about it, nor did he see her name on it, or know it was a will. He and his father were not in the room together; his father's name had been signed before he entered the room.

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was not proved
to have been
duly executed.

Dr. Addams, for the executor.—The will is in the handwriting of the deceased; it is signed by her and by two attesting witnesses, and it is apparent from the signatures themselves that they must have been all written at the same time and with the same (blue) ink. In spite of the statements of the witnesses, the Court will presume *omnia rite acta fuisse*.

ARGUMENT.

Dr. Bayford, *contra*, stopped.

SIR H. JENNER FUST.

JUDGMENT.

The will is written in black ink; the signatures are in blue ink; but both the witnesses concur in saying that they were not present together when they subscribed, and that the deceased did not sign the paper in their presence. Can I in the face of the evidence of witnesses deposing so positively, by conjecture, come to the conclusion that they have not deposed according to the facts? It is possible that they may not have given true testimony; but I have not any circumstances before me, except the blue ink. In some cases, the witnesses forget; they cannot recollect whether the will was signed at the time or not, and they do not remember whether they were both present together, owing to the length of time that had elapsed. The Court is not bound by the recollection of witnesses. In this case, I am afraid I must pronounce against the will.

Will pronounced
against.

JUNE 22. I do not pronounce that the will was not duly executed, but that it is not proved to be so. I make no order as to costs.
Beach v. Clarke.

Proctors:—*Brooks*, for the husband; *Pownall*, for the executor.

Add. Court Day.

JUNE 28.

Attestation. *PLAYNE v. SCRIVEN.—Allegation.*—This was a business —A testatrix, after duly executing her will, being informed that S. E. G., one of the two attesting witnesses, a legatee, would lose her legacy in consequence of being a witness, directed that the signature of S. E. G. should be struck through with ink, and re-executed her will in the presence of J. P. K., the other witness, and a third person, the latter writing his signature, but J. P. K. merely tracing his name over with a dry pen:—Held, that this was not a sufficient compliance with the Statute, which, by "subscription," means an act done at the time apparent on the face of the will, where- as, by going over the name with

of proving the will of Elizabeth Keen, widow, who died 10th January, 1849, by Edwin Playne, her nephew, and one of the executors named in the will, against William Scriven, the other executor; the question being whether, the will having been re-executed, and one of the two witnesses, at such re-execution, who had previously subscribed the will, having merely traced over his name with a dry pen, this was a good attestation. The question had been several times before the Court on Motion for probate of the will, first as re-executed and afterwards as originally executed; but the Court rejected both Motions, leaving the party to propound the paper, in order to have the question formally discussed.

The paper was accordingly propounded in an Allegation which pleaded the making and executing of the will on the 25th June, 1845; that, immediately after the execution, J. P. K., one of the two attesting witnesses, observed to the deceased that the legacy given in the will to S. E. G., the other witness, would be void, in consequence of her having attested the will, whereupon he (J. P. K.) was directed by the deceased to (and did in her presence and in that of S. E. G.) strike through with ink the signature of S. E. G., and, by the desire of the deceased, procured the attendance of W. R. C., for the purpose of his being a witness to the re-execution of the will; that, immediately upon the arrival of J. P. K. and W. R. C. at the house of the deceased, she produced to them her will, and in their joint presence acknowledged her subscription thereto; whereupon J. P. K., with a dry pen, traced over his name so previously subscribed thereto,

and W. R. C. subscribed his name thereto, respectively in the presence of the deceased and of each other, as witnesses attesting the re-execution of the said will.

Dr. Jenner, for the executor propounding the will.—At first sight I should have said that the act done by the witness was sufficient, but for the case of *Bailey v. Bellamy** (cited by *Dr. Deane*, on Motion), where it was held that, under the 1 & 2 Vict. c. 110, s. 9, a Warrant of Attorney, to confess judgment, re-executed, was not duly attested, on re-execution, where the attorney, who had attested it before, traced his name over again with a dry pen. But that was a totally different instrument, and that Statute (for abolishing Arrest on Mesne Process) was passed for a special purpose. The 9th section requires that “the attorney shall subscribe his name as a witness to the due execution of the Warrant, and thereby declare himself to be attorney for the person executing the same, and state that he subscribes as such attorney;” and the next section enacts that any Warrant of Attorney not so executed shall be void. But the 9th section of the Wills Act is not so precise; there is no negative there. The Act does not say the witness shall not acknowledge his signature, and that the will shall not be valid if he does not actually sign. A testator may now sign, or acknowledge his signature. The introduction of the word “acknowledge” into the Wills Act, as to a testator, does not exclude acknowledgment by a witness. [PER CURIAM.—Yes; it was decided by *Moore v. King*,† that the Wills Act, which empowers a testator to acknowledge his signature, gives no such authority to a witness.] Under the Statute 1 & 2 Vict. c. 110, there is a distinction: no marksman can sign his name; but under the Wills Act a marksman would be a good witness, and the Court would be under this difficulty, that if a witness makes a mark it is good, whereas if he goes over his signature with a dry pen it is of no effect. [PER CURIAM.—The distinction is this: in the former case, the mark is apparent; in the latter, not. The case in *Dowling* was under a peculiar Statute. Here

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a dry pen, nothing is in fact subscribed, i. e. written.—Probate of the will as originally executed.

JUNE 20.

ARGUMENT.

* 9 Dowl. P. C. 507.

† 2 Notes of Ca. 45. 3 Curt. 243.

JUNE 28.

*Playne v.
Scriven.*

the question is, what are the words of the Wills Act?] "Shall attest and shall subscribe." [PER CURIAM.—Is going over the name, previously written, with a dry pen, "subscribing?"]

Dr. Deane, for the opposing executor, was not heard. In support of the Motion, he had cited, besides the cases of *Bailey v. Bellamy* and *Moore v. King*, *Powell On Devises*,* *Gryle v. Gryle*,† and *Casement v. Fulton*.‡

JUDGMENT.

SIR H. JENNER FUST.

I pronounce for the will as originally executed. I think the true construction of the Act is this: that whereas a testator may sign his name or acknowledge his signature in the presence of the witnesses, they, at the same time, shall attest and shall subscribe the will in his presence, which means that there shall be an act done at the time which shall be apparent on the face of the will; and the going over the signature already made with a dry pen, though it would have been sufficient for the testatrix, in this case, is not sufficient for a witness, within the provisions of the Act; because acknowledgment by a witness is held not to be a sufficient compliance with the Act. I am of opinion that the going over the signature with a dry pen, by a witness, is not a "subscription," as nothing in fact is subscribed,—nothing is written. Therefore I am of opinion that there has not been a sufficient attestation of the re-execution of this will. [*Deane*.—The case of *Jones v. Dale*, referred to in *Sugden On Powers*,§ confirms this opinion of the Court: "Saying and doing a thing is not the same thing; and his saying he had written it himself will not amount to a 'subscribing' in the presence of three witnesses, as the Power requires."] Let probate pass of the will as originally executed, with the name of the first witness, though struck through, and without the name of the third witness.

Probate as
originally exe-
cuted.

Proctors:—*Roberts*, for the executor propounding; *Coots*, for the executor opposing.

* P. 111, n.

† 2 Atk. 176.

‡ 5 Moo. P. C. C. 140.

§ 1 Vol. 284.

JULY 3.

Bye-Day.

IN THE GOODS OF JAMES MCCALLUM, DEC.—*Motion, ex-parte.*—The deceased died 13th May last, leaving a paper intended to be his will, written upon a printed form, whereby he bequeathed to his wife all his property (amounting to about £75), and appointed her sole executrix. The will fills the entire space left for that purpose on the first side of the printed paper, concluding, "Dated in H.M. Dockyard, Woolwich, this 5th day of February, in the year of our Lord 1846," this writing having been with some difficulty got into the space allotted to the disposition in the third column, headed, "Here write the will." The first column is headed "Directions," and the second, "Margin for the signature of the testator and subscription of the witnesses in case of any alteration in the will." At the foot of the first column is the attestation-clause, which stands thus in the printed form: "Signed by the said testator, in the presence of us, present at the same time, who, in his presence, have subscribed our names as witnesses." The deceased had signed his name in the blank space left in the attestation-clause, and the two witnesses had subscribed their names, on the right side of that clause, in the second column.

Dr. Waddilove, in moving for probate, observed that the testator had been misled by the printed form, having mistaken the direction at the head of the first column, "the will must be signed at the foot or end of it by the testator, or by some other person in his presence and by his direction."

SIR H. JENNER FUST.

DECREE.

I am of opinion that this is a good execution. The signature is at the conclusion of the will, and immediately after the appointment of the executor. I think, although it is not precisely at the foot or end, the Court may, under the Act, decree probate to issue. These printed forms are not safe guides to parties.

Probate granted.

Fielder, Proctor.

Consistory Court of London.

Add. Court Day.

JULY 11.

Practice. — **DASENT v. DASENT.**—*Motion.*—This was a cause of divorce by reason of cruelty and adultery by Elizabeth Dasent against Bury Irwin Dasent, her husband, described as of the parish of St. James, Westminster. The Citation was returned with a special certificate, and a Decree by ways and means issued, the certificate indorsed on which stated that the Decree was duly executed by affixing it for some time on the outer door of the dwelling-house or last known usual place of residence of Mr. Dasent, No. 11, Pall Mall, and also on the outer door of the parish church, and by leaving affixed on each of the doors a true copy thereof; and that, though every possible inquiry was made respecting the residence of Mr. Dasent, no more minute information than that he had gone to some place in the West Indies could be obtained. A Citation was afterwards brought in personally served on Mr. Dasent in the island of St. Vincent, in the West Indies. An affidavit of the wife, resident at Chelsea, in Middlesex, after stating the marriage of the parties and the birth of a child, alleged acts of cruelty on the part of her husband, and deposed that she was not apprized of any act of adultery committed by him until October, 1848, when she gave instructions to institute the present suit, which she is desirous to carry forward.

MOTION.

Dr. Addams moved the Court to pronounce the husband in contempt, for the purpose of proceeding in the suit. The marriage took place in London, and the parties cohabited there up to the time when Mr. Dasent quitted it. Mrs. Dasent had no means of proceeding unless she could do so here. It would be a great hardship to her if she were compelled to stay proceedings until Mr. Dasent returned to this country. He might then call upon her to live with him, and she might be deprived of the evidence she now possessed to prove his adultery. It only carried the case a little further than that of *Collett v.*

Collett.* Mr. Dasent, until he quitted the country, had a house at 11, Pall Mall. There was everything to found the jurisdiction of the Court, except that Mr. Dasent was now abroad, and had no place of residence in this country. [PER CURIAM.—In *Tenducci v. Tenducci*,† the gentleman was served at Naples: he had left the country a long time.] That was a suit for annulling a marriage. It is sufficient, in order to found the jurisdiction, that Mr. Dasent had a residence in this country as long as he was here. [PER CURIAM.—There is no ecclesiastical jurisdiction in St. Vincent's?] None at all, and the wife is resident here.

JULY 11.

*Dasent v.
Dasent.*

DR. LUSHINGTON pronounced the husband in contempt JUDGMENT. for the purpose of proceeding,—nothing further.

Bathurst, Proctor for the wife.

High Court of Admiralty.

JULY 12.

Add. Court Day.

THE "VIVID" (ROBINSON).—*Cause, by Act on Petition.*— Collision. — This was a cause of damage, by the owners of the *Mayoress*, A steamer deviating from the Trinity-House Rules, in order (as alleged) to avoid the collision, held solely to blame.—The importance of adhering strictly to the Rules. a brigantine of 131 tons, against the *Vivid*, a steam-vessel, with which she came in collision on the 13th April, between Hasborough and Cromer. The brigantine, which was proceeding from Sunderland to London, with a cargo of coals, was close-hauled on the larboard tack. The steamer, on her way from London to Hull, on discovering the brigantine (which was not until the vessels were close upon each other), put her helm to starboard, as the only course whereby, according to her master, a collision could have been avoided; her engines being likewise eased and stopped.

* 2 Notes of Ca. 504.

† 3 Phill. 595.

JULY 19.

Vivid.

The Court was assisted by two Elder Brethren of the Trinity House.*

The Counsel for the steam-vessel (*Drs. Addams and Robinson*) were alone heard.

JUDGMENT.

DR. LUSHINGTON.

The gentlemen by whom I am assisted are of opinion that the blame, under the circumstances of this case, attaches solely to the steamer; and in that opinion I entirely agree. The reasons, however, which I am about to state for my judgment, are not those of these gentlemen, but my own.

I consider it a matter of the greatest importance to the safety of the great commercial interests of this country, having ships at sea with valuable cargoes, and still more valuable lives, to maintain, as far as I can, those rules and regulations which hitherto have been recognized in this Court, and upheld by superior jurisdiction. We are constantly hearing of calamities which have occurred in consequence of collisions of this description, and therefore the observations I am about to make are for the sake of pointing out what I think ought to be done under circumstances similar to those now before us.

The facts.

Supposing all which is stated by the steamer to be true, so far as the facts are capable of being proved, I should still retain my opinion that she was to blame. Here is a vessel on the larboard tack, close-hauled, and she descries a steamer at a certain distance. I lay out of the question, for the moment, whether this vessel did or did not show a light, and I now look to the conduct of the steamer herself. The master says in his affidavit, "The night being dark, but clear, a sail was reported by the look-out forward, close on the starboard bow of the steam-ship, which the smoke from her funnel, the wind being right aft, and there having been no light exhibited, or notice of her approach given, had prevented the look-out from seeing and reporting earlier. The helm of the steam-ship was immediately, by direction of the

* Captain Rees and Captain Farrer.

JULY 12.

Vivid.

deponent, put hard a-starboard, being, from the proximity of the two vessels, the only course that could be pursued with any chance of avoiding a collision, and her engines were eased and stopped." Now, first, I am of opinion that it was not the duty of the brigantine to get out of the way. I entirely admit the principle laid down by Dr. Robinson, that, where you can with perfect safety escape an accident by any manœuvre whatsoever, it is your duty to do it; but I wholly deny that danger would be averted, or that infinitely greater danger would not occur, if a vessel close-hauled on the larboard tack, on descrying a steamer, were to take upon herself to deviate from her course, for the purpose of getting out of the way, because I am of opinion that by so doing it would lead to the chance of infinitely more collisions than take place at present. The steamer knows her duty; she knows that she is to be considered a vessel having the wind perfectly free, and that it is her duty to get out of the way. The other vessel knows her duty, namely, that she is to keep her course; and if there were to be changes, in the manner suggested by Counsel, on the part of vessels close-hauled, the consequence inevitably would be more collisions.

But how comes it that this steamer could not perceive the vessel approaching her on a night which is stated to be dark, but clear? According to her own statement, she could not see her until the very moment that the vessel was almost in contact with her, because the smoke from the funnel obscured the sight of the persons on the look-out. What then was the duty of the steamer? To have slackened her speed, so as to give her a greater opportunity of avoiding any vessel with which there was a probability of coming into contact. That is the principle we must lay down, or what will be the consequence? Why, the inference from the statement here, if it were to be permitted to stand in a Court of law, would be this,—that a steamer, being in such a condition that it was utterly impossible for her to see a merchant-vessel till they were close in contact, would be at liberty to keep up her speed near the coasts of England, where there are so many vessels, so that there would be no

JULY 12.

*Vivid.*The steamer
to blame.

chance of avoiding collisions. According to her own statement, she was wrong. If it be contended, on the other hand, that there was any deficiency on the part of the vessel proceeding, on the ground of not exhibiting a light, or that the crew did not hail, the answer is plain. Parties may swear that they did not see a light, but that never can be received as evidence in opposition to those who say that they showed a light; because both statements may be true. The light may have been exhibited, and those on board the steamer may not have seen it. There is no contradiction here. So with respect to hailing. It may be true that there was hailing on board the sailing vessel, and that it was not heard by the steamer; but that does not contradict the fact. Therefore, in whatever point of view I look at the case, I entertain no doubt that the steamer was to blame. I am happy to think, gentlemen, that your judgment concurs with mine, without which I should have doubted its correctness.

Proctors:—*Crosse*, for the brigantine; *Toller*, for the steam-vessel.

Salvage.—Derelict.—Claim by Greenwich Hospital.—After a derelict had been in the possession of salvors for five days, a Queen's ship came up, and was allowed to join in the remaining service, for which a salvage reward was allotted to her:—Held, that the service so rendered by her was not rendered to a derelict, so as to entitle Greenwich Hospital to the per-centage

THE "LADY KENNAWAY" (AVERY).—*Motion*.—The vessel, in this case, having been abandoned by her crew, in the Bay of Biscay, was fallen in with by two Danish vessels, and taken possession of. After the derelict had been five days in possession of the Danes, H.M. brigantine *Dolphin* came up, and assisted in conveying the vessel to Plymouth. In the adjudication of salvage (the property being valuable), the Court allotted £1,500 to the *Dolphin*. A Motion was now moved for, calling upon the agents for that ship (to whom this sum had been paid) to bring in the accounts, in order that the per-centage and shares unclaimed and forfeited might be handed over to Greenwich Hospital, pursuant to the Statute 57 Geo. 3, c. 127, on the ground that, at the time when the *Dolphin* came up, the *Lady Kennaway* was a derelict within the intention of the Statute.

Sir J. Dodson, Q.A.—The vessel, though found in the first instance by the two Danish vessels, when it is not denied that she was a derelict, had not lost that character,

within the Statute, when Her Majesty's ship came up: she continued in that character until she was restored to her owners, or declared Droits of Admiralty. The definition of "derelict," is a vessel deserted by her master and crew, and not of right in possession of her owners. *The "Thetis."** shares, under The Court has decreed salvage of this vessel as of a derelict; 57 Geo. 3, c. 127. Greenwich Hospital must, therefore, be entitled to the percentage, and to the unclaimed and forfeited shares. If not, what is to become of them? Are they to remain in the hands of the agents?

JULY 12.

*Lady Kennaway.*JULY 10.
ARGUMENT.

Dr. Phillimore, Adm. A., on the same side.—The objection is a narrow and technical one. The character of derelict was stamped on this vessel when found by the Queen's ship.

Dr. Addams, *contra*.—The agents do not refuse to pay; they resist the Monition on principle, until the Court shall decide. It is asked what is to become of the unclaimed and forfeited shares? The same question would arise in every case of salvage. The sum allotted by the Court was not given as for a derelict, but for civil salvage. The two Danish vessels had the *Lady Kennaway* in possession for five days, and navigated her for some hundred miles.

Sir J. Dodson.—The 10 Geo. 4, c. 28, relates to matters of a similar kind.

DR. LUSHINGTON.

JULY 12.

JUDGMENT.

In the Argument on behalf of the Admiralty (by whose directions, I presume, this Motion was made), it was said that this vessel was, in the proper sense of the term, found derelict by the *Dolphin*, within the terms of the Act of Parliament. I have looked at all the Statutes referred to by Counsel, but there is only one which bears upon the question at issue. This being so, the question lies in the narrowest possible compass.

The object of the 57 Geo. 3, c. 127, is twofold,—to give five per cent. and all unclaimed shares, in the case of prize-money, Droits of Admiralty, &c., to Greenwich Hospital,

* 3 Hagg. A. R. 228.

JULY 12.

*Lady
Kennaway.*Motion re-
fused.

and, by a former Act, five per cent. had been given on all salvage-money. There are no words in the 57 Geo. 3, c. 127, that apply to civil salvage, and I am not at liberty, in the construction of an Act of Parliament, to suppose that the omission was purely accidental. There can be no doubt that the *Lady Kennaway* was originally a derelict, and it is argued by Her Majesty's Advocate that she retained that character until the end of the transaction, consequently, that Greenwich Hospital possesses the claim now contended for. But it is utterly impossible that I can hold that this vessel was a derelict when the *Dolphin* came up, for she was then in the possession of six or eight persons engaged in performing salvage service. I did not decree salvage to the *Dolphin* on the ground that she had rescued a derelict, for the *Lady Kennaway* was not then clothed with that character; consequently, I am not at liberty to consent to the application now made.

Proctors:—*Nelson*, for the *Dolphin*; *Addams, jun.*, for the Danish salvors; *Deacon*, for the owners; *Coots* and *Smale*, for other parties.

Prerogative Court of Canterbury.

Add. Court Day.

JULY 13.

Attestation.—Where the subscribing witnesses to the will of a testatrix in *extremis*, which they signed in the room where she lay in bed, deposed (contrary to the evidence of the drawer of the will) that

TRIBE v. TRIBE AND OTHERS.—*Cause*.—This was a business of proving in solemn form the will of Frances Tribe, spinster, dated 22nd December, 1848, promoted by John Tribe, a brother of the deceased and a legatee therein named, against William Foard Tribe, her nephew, and sole executor named in a prior will dated 8th May, 1848. The deceased died 23rd December, 1848, aged fifty-five, leaving personal property value £2,300, and real estate value £520. She left behind her mother, two brothers, and two sisters. By the will in question, the deceased purported to give to her

sisters, Jane and Mary (besides what her mother had left her in her will), her land called Wainces, and her third of £800; to her brother John, £800, to which she was entitled on her mother's death; £5 to Mrs. Eadon; £10 to Martha Davies, her niece; £200 to her nephew Henry Tribe, and the remainder to her other nephew, William Foard Tribe, to whom she devised her portion of the house and land at Tarring, to which she was entitled on her mother's death, and appointed him her executor. By the will of 8th May, 1848, she gave all her real and personal estate to her nephew William Foard Tribe absolutely, subject to a legacy of £100 to her other nephew, Henry Tribe, and she appointed William Foard Tribe sole executor. A Decree having issued at the instance of Wm. F. Tribe, the will of 22nd December, 1848, was propounded by John Tribe, one of the deceased's brothers, in a *Conditit*, upon which were examined the drawer of the will (Mary Tribe, a sister of the deceased), and the two attesting witnesses, Jane Grevatt, the nurse attending the deceased, and Martha Davies, who waited upon her.

The questions were, first, whether the will was proved to be the act of the deceased; second, whether it had been duly executed under the Statute.

Upon the latter point, Mary Tribe deposed that, on the day of the execution, the 23rd December (the date "22nd" being inserted by her through mistake), the deceased having expressed herself as unhappy at having made the will of May, 1848, she (the witness) proposed to make a fresh will for her, to which suggestion the deceased agreed; that she accordingly wrote out the will agreeably to what the deceased had been saying to her; that, four hours before the deceased's death, she signed the will in the presence of the witness, and of Grevatt and Davies, all standing by the bed-side; that the witnesses subscribed the paper at the dressing-table in the room where the deceased lay in bed, which was small, signing in the presence of each other, and within sight of the deceased: "I hear they state," the witness said, "that the curtains were closed; but it was no such thing; that I positively state."

JULY 13.

Tribe v. Tribe.

the curtains of the bed were closed, and that she not only did not see them sign, but, in her condition and position, could not by possibility have seen them: — Held, that the Statute had not been complied with.

JULY 13.
Tribe v. Tribe.

Jane Grevatt deposed that the deceased signed the paper in the presence of Martha Davies and herself, and then lay down again, seeming very much exhausted; that she (witness) then made her mark, and Martha Davies subscribed her name, to the paper, "in the deceased's presence, no doubt," the witness said, "so far as its being in the same room; but it was not where she could see us, for, as we had laid her down, her back was towards the table at which we signed, and if her face had been turned our way, the curtains of her bed were that closed as would have prevented her seeing us at the table." Upon interrogatory, the witness said: "I cannot swear that the deceased ever was aware that we had actually attested the paper; she certainly had not seen us sign it. I must say, and I do swear, that in my belief she was aware of the fact of our having signed it, because she was so very sensible, and she certainly knew that I was asked and was about to sign it, by her saying to me, when we were asked to sign, 'Your name is not Winchester now, is it?' which I understood to be to point out to me that I was to sign by my proper name. The night in question was excessively cold, and the curtains of the bed in which the deceased lay dying were kept closely drawn, as well to keep the cold as the glare of the candle from the deceased, during the whole time I and my fellow-witness were putting our signatures to the paper. The deceased could not by possibility have seen through the curtains, for they were lined, nor could she by possibility have so turned herself in bed unassisted as to have given herself the means of partially withdrawing the curtains, so as to have seen us sign the paper. She could not turn herself in the bed unassisted any part of that night. In the relative positions in which I and my fellow-witness and she then were, she neither did see, nor by possibility in her then state could have seen, me and my fellow-witness sign the said paper."

Martha Davies deposed that, after the deceased had signed the paper in the presence of her and her co-witness, they laid her down in bed again; that Miss Mary Tribe then took the paper to the table in the room, and told the witness and Grevatt where to sign; that it was impossible that the

deceased could have seen them sign, for she lay on one side, with her face towards the door, looking, therefore, in a contrary direction from where they stood, and she was then far too helpless to turn herself round to look: "besides, the curtains of the bed, which were drawn, stood between us and her." Upon interrogatory, this witness deposed to the same effect as the last, that the bed-curtains were closely drawn, and that the deceased could not by possibility, in her then state, have seen the witnesses sign the paper.

JULY 13.
Tribe v. Tribe.

Upon this part of the case,

Dr. Addams, for Mr. W. F. Tribe, the party opposing the will of December, 1848.—Although Mary Tribe says that the witnesses signed the will in her sister's (the deceased's) sight, it is manifest it could not be so; that the deceased could not by possibility have seen them sign. The question, therefore, is, whether their being in the same room when they subscribed the will is sufficient under the Wills Act. In *Newton v. Clarke*,* there was no suspicion of fraud; whereas, in this case, there is the gravest possible suspicion of fraud. If the Court holds, in the present case, that the being in the same room is sufficient, it will lay down the rule too broadly; it must depend on the size of the room,—take Westminster Hall, for example, with 500 people in it, or the Long Room at the Custom House. [PER CURIAM.—It must depend on all the circumstances.] The principle must be this: whether the witnesses were or might have been within sight of the testator, and the *onus probandi* is with the party setting up the attestation. In *Longford v. Eyre*,† Lord Macclesfield said, the mere subscribing a will by a witness in the same room did not imply its being done in the testator's presence, for "it might be in a corner of the room, in a clandestine and fraudulent way." In the present case, the witnesses did not know it was a will,—that was kept from them; and it is proved that it was physically impossible that the deceased, who was *in extremis*, could have seen the witnesses at the time they subscribed.

JUNE 22 and
JULY 3.
ARGUMENT.

Drs. Harding and *R. Phillimore*, for the party propound-

* 2 Curt. 320.

† 1 P. Wms. 741.

JULY 13. ing the will.—The case of *Newton v. Clarke*, decided in 1839,—and every treatise on the Wills Act refers to that case,—laid it down that it is not necessary for the testator actually to see the witnesses sign the will, if they are in the same room. *Williams, On Executors.* Casson v. Dade.†*

JULY 13.
JUDGMENT.

SIR H. JENNER FUST.

(On the point of law.) The witnesses are directly opposed to each other. Mary Tribe, in the most distinct terms, and in the most positive manner, swears that the curtains were not closed; that her sister not only could see the witnesses sign, but did see them. The two subscribing witnesses, on the other hand, swear in positive terms that she could not by possibility see them attest the execution of the will. The question is, to whom is the Court to pay attention? Mary Tribe has an interest in supporting the act; the two subscribing witnesses have no interest to serve. The deceased died within three or four hours after the will was completed; she became speechless soon after she signed the will. Both the attesting witnesses say that the deceased could not by possibility have turned herself so as to enable her to have seen them sign, even if the curtains had not been closed. I am of opinion that this is not a due compliance with the Statute. Not only were the curtains closed, but there is the additional fact, positively deposed to by the two witnesses, that by no possibility could the deceased have seen them sign; and what distinction is there between this and the witnesses signing in another room? The deceased did not see them, and could not see them, which goes further than the case which has been cited, where the party could have seen, but that the curtains of the bed were closed. It is positively sworn that the deceased could not have seen the witness, even if the curtains had been partially unclosed. Can it be said, then, that the will was attested in the presence of the deceased? I think it is impossible that the Court can so hold. I think the Court has gone as far as it could when it held that, where the curtains were closed, but the party could otherwise have seen the

* 1 Vol., p. 77.

† 1 Bro. C. C. 98.

witnesses attest, it was a sufficient compliance with the Act. JULY 13.
But here the deceased not only did not see, but could not by possibility have seen them. *Tribe v. Tribe.*

I pronounce against the validity of this will, and decree probate of the will of the 8th May, 1848, to pass to the executor. Last will pronounced against.

Proctors:—*Coote*, for the party opposing the will; *Pritchard*, for the party propounding it.

High Court of Admiralty.

JULY 18.

Add. Court Day.

THE "LEITH" (LAKER).—*Cause, by Act on Petition.*— Collision between a sailing-vessel and a steam-vessel; the latter, having acted in obedience to the Stat. 9 & 10 Vict. c. 100, held to be blameless. — Construction of that Statute.

This was a cause of damage, in which the owners of the *Perthshire*, a schooner of 126 tons, sued the *Leith*, a steamer of 600 tons, to recover the amount of damage sustained by the schooner in a collision between the two vessels on the 26th August, 1848, at midnight, near Gillingham Point, in Half-way Reach. The schooner, laden with oats, bound from the Baltic to London, was coming up the river, the night being clear, the wind W.S.W. The steamer was going down the river on the south side. The schooner alleged that she was close-hauled, and was hugging the Kentish shore, in order to avoid tacking, and that, when she discovered the steamer, she starboarded her helm, expecting the steamer would pass down mid-channel; instead of which, she ported her helm, and ran between the shore and the schooner, striking the latter a violent blow. On the part of the steamer, it was alleged that, by the Trinity House Rules, and under the 9 & 10 Vict. c. 100, secc. 9 to 13, she was justified in porting her helm, and if the schooner had done the same, no collision would have happened.

JULY 18.

Leith.

The Court was assisted by two Elder Brethren of the Trinity House.*

Drs. Haggard and Jenner, for the schooner ; *Drs. Addams and Robinson*, for the steam-vessel.

SUMMING UP.

DR. LUSHINGTON.

Gentlemen, it is admitted, on behalf of the vessel proceeding in this case, that, upon descrying the steamer, the waterman (who had been engaged to pilot the schooner), who was the servant of the owner, ordered the man at the wheel to luff, which was done immediately, until the sails were shaking. In his second affidavit he states that, when the steamer hove in sight, the helm was again put to starboard until the sails were shaking, as deposed to in his former affidavit ; but that "the same was not at any time put suddenly a-starboard, and her head brought to wind, until immediately before the collision, and when the same, from the course pursued by the steamer, became inevitable, when the deponent put the helm hard a-starboard, to ease the blow." So far as I can make it out, the helm of the *Perthshire* was put to starboard almost from the time when she saw the steamer. He says he ordered the man at the helm to luff, the wind being W.S.W. All that he denies in this affidavit is, that the helm was "suddenly" put hard a-starboard, except at the last moment, when he says that it was *ex necessitate* put hard a-starboard, because the collision was inevitable.

I think the questions might be put to you briefly ; yet it is, perhaps, my duty to notice some other circumstances which have arisen in the discussion. But one of the questions will be this : whether, under the circumstances stated, you are of opinion that the helm of the *Perthshire* was put to starboard, and whether that was a right and proper measure.

With regard to the steamer, she was going from London down the river, and, according to the statement of all on board her, she had, from the time she left Brown's Wharf,

* Captain Weller and Captain Foord.

kept the S. side of the river. Some discussion has arisen as to whether she did so in conformity with the Statute 9 & 10 Vict. c. 100, to which Statute undoubtedly it is necessary for every steam-vessel to attend. I do not think that there is any real difficulty in construing the Statute, though I am of opinion that it might be expressed in much clearer language. The words of the enactment are these: "That every steam-vessel, when meeting or passing any other steam-vessel, shall pass as far as may be safe on the port side of such other vessel,"—respecting that there can be no doubt at all,—it is simply that they should pass on the port side; "and every steam-vessel navigating any river or narrow channel shall keep as far as is practicable to that side of the fairway or mid-channel of such river or channel which lies on the starboard side of such vessel." Now, certainly, it would have been clearer if it had been said, "which lies on the starboard side of such steam-vessel,"—whereas, some ambiguity is raised through the absence of that definition. Therefore, it is true, as I think, that, in keeping close to the southern shore, this vessel was following the orders prescribed by the 9th section of this Act. But it is my duty to bring your attention to the words that follow: "due regard being had to the tide, and to the position of each vessel in such tide." These are very large qualifying words, for the clause means very much like this,—you shall keep along that side of the channel which lies on the starboard side of the vessel, provided it may be done with convenience or safety to the vessel you may happen to meet. Therefore, it is a rule laid down, but with very great scope for the judgment of those who are to follow it. However, those on board the steamer followed this rule, and, upon descrying the schooner coming round Gillingham Point, according to their own statement, and no doubt it is true, they ported their helm. The sole question will be, whether they were right or wrong in so doing.

There are many facts in the case which really have nothing to do with the question. I cannot see what the track which was pursued by the *Perthshire* on the other side of

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of the Statute.

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the river, or at least at a considerable distance from the track of the *Leith*, has to do with the point you have to decide ; nor do I understand what the course pursued by a schooner, which kept in the middle of the river, has to do with it, because we must recollect that, when vessels are pursuing their course, a short space of time may lead to totally different circumstances, and may make it right for one vessel to go to the N., and for another following at no great distance to keep to the S. There has been some discussion as to the state of the wind and the tide: the latter has been agreed upon, and the former is said to have been W.S.W. On the one hand, it is alleged that the schooner was proceeding close-hauled; and on the other, it is said that she need not have been close-hauled if she had not pleased. You, being acquainted with the locality, can form your judgment as to whether she was close-hauled or not. You know what are the rules of the Trinity House, or rather what are the rules of navigation ; because, when a steamer meets a sailing-vessel, as much or more depends on the rules of navigation as on any rules you have laid down. Your rules are very specific as to steamers ; but they do not embrace all cases of steamers meeting sailing-vessels.

The question I put to you is, whether you think either or both vessels to blame, and which ?

(After consultation.)

OPINION.

CAPTAIN WELLER.—We think the schooner acted wrong in starboarding her helm ; we consider that she had the wind free, and that there was a flood tide. The *Leith* was justified in keeping close to the south shore in a slack tide, and acted properly in porting her helm.

JUDGMENT.

PER CURIAM.—I pronounce against this claim.

Proctors:—*Currey*, for the schooner ; *Toller*, for the steamer.

Prerogative Court of Canterbury.

JULY 19.

Add. Court Day.

THOMSON AND BAXTER v. HEMPENSTALL.—Cause.—The testator, Mr. George Durant, of Tong Castle, Salop, died on the 29th November, 1844, at the age of sixty-eight, possessed of personal property value £22,500, and of real estate estimated at from £7,000 to £14,000. He was also entitled to the reversion in fee of the Tong Castle estate, expectant upon the failure of issue of his late son. He left behind him several wills, the last (C) bearing date 7th February, 1844, wherein Messrs. Thomson and Baxter are named two of the executors. In this will occurs the following clause: "And hereby revoking all former wills, codicils, and testamentary dispositions by me at any time or times heretofore made (except my will bearing date the 13th of December, 1831, which relates exclusively to the reversion in fee of the Tong Castle estate), I declare this to be my last and only will." No will was found amongst the testator's papers which precisely answers the description in the above clause. Two wills answer thereto, each in part; namely, one (A) bearing the date quoted, 13th December, 1831 (which was revoked in 1835), but which does not relate exclusively to the reversion in fee of the Tong Castle estate, disposing not only of that estate, but of all the rest of the testator's real and personal estate; the other (B) does relate exclusively to the reversion in fee of the Tong Castle estate, but bears the date of 22nd May, 1839. The question, out of which the present suit arose, was, whether the will of December, 1831, was revived by the last will of 7th February, 1844. The executors named in the will of 1831 being dead, George Hempenstall, a legatee under that will, alleging that it had been revived by the will of 1844, and that the widow and children of the testator, the only persons beneficially interested in his personal estate disposed of by the will of 1831, took a less interest thereunder than under the will of 1844,—called upon the executors of the

A testator, having left several wills, by the last (of 1844), revoked all his former wills, "except my will bearing date the 13th December, 1831, which relates exclusively to the reversion in fee of the T. estate." The will of 13th December, 1831, did not relate "exclusively" to the reversion in fee of that estate, which it disposed of with the rest of the property, real and personal; the only will which related exclusively to the reversion in fee of the T. estate was dated in 1839:—Held, upon construction and the circumstances, that the will of 1831 was not revived, and that of 1844 alone admitted to probate.

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last-named paper to declare whether they would take probate of the two wills of 1831 and 1844 (A and C), as together containing the will, and upon their refusal to take probate of A, the papers A and C were propounded, on behalf of the legatee, in an Allegation which pleaded that the paper C revived the will A, and that the word "exclusively" was inserted therein without any instructions from the testator, whose attention was never particularly called thereto.

March 12.

Drs. Harding and Bayford, for the legatee; *Drs. Haggard and Jenner*, for the executors.

July 19.

JUDGMENT.

DR. LUSHINGTON.*

George Durant, of Tong Castle, in the county of Salop, died on the 29th of November, 1844. He made many wills and testamentary instruments, some of which I must particularly notice: there are others which do not appear to me to have any direct bearing on the question I have to decide.

Messrs. Thomson and Baxter are two of the executors named in a will executed by the testator on the 7th of February, 1844 (marked C); they pray probate of this will, exclusive of all other testamentary papers. The other party is Mr. Hempenstall, who is a legatee in a will bearing date December 13th, 1831 (marked A), and he prays probate of that will, together with the will of 1844.

The question to be decided arises from the following passage, with which the will of 1844 concludes: "Revoking all former wills, codicils, and testamentary dispositions by me at any time or times heretofore made, except my will bearing date the 13th of December, 1831, which relates exclusively to the reversion in fee of the Tong Castle estate."

The operation of this clause is purely a question of construction. It is clear that all wills are revoked excepting the one described by the testator, and that one so described is revived and in effect republished. But I must remember, in considering this case, and always bear in mind, that I am

* Sitting as Surrogate.

to deal with a testamentary paper made under the Statute ; because the law as to wills is in many respects different now from what it was before the Statute. Apparently, this passage is not subject to doubt, for the instrument is described both by its date and its contents. If any doubt can be raised, it must arise from facts and circumstances *dehors* the will of 1844 ; in other words, if there be a doubt, it is a latent ambiguity.

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Hempstead.*

The questions which arise with reference to latent ambiguities are often of great difficulty and nicety ; but the principles which ought to govern are, I apprehend, satisfactorily settled ; and it must be my duty rigidly to adhere to the principles so fixed by decided cases.

Principles
which govern
latent ambiguities.

It cannot, however, be necessary to do more than simply state such of the rules, which apply to this particular case, as they are to be found in Sir James Wigram's admirable treatise on the subject ;* for it would be a waste of time to travel through all the cases, the substance of which is given in that work. It is quite obvious that, in considering the operation and effect of a revoking clause, I must be guided by the same principles as those which apply to the interpretation of a devise or bequest : these are all equally the construction of a written instrument.

In looking for the true construction of this passage, I first direct my attention to the will dated the 13th of December, 1831. This is a will contained in twenty-six sides of paper, comprising very numerous devises and bequests, and consequently not according with the description given by the clause in the will of 1844, namely, a will which "relates *exclusively* to the reversion in fee of the Tong Castle estate." It is right, however, to add, that this will of 1831 does devise the reversion of the Tong Castle estate.

There is, however, a will, dated the 22nd of May, 1839, which does relate exclusively to the reversion in fee of the Tong estate, but disposes of it in a different manner from the will of 1831.

* On the Adm. of Extrinsic Evidence.

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I now again look back to the clause of the will of 1844, and remember that it is a description of a will to be revived, and revived only in accordance with the Statute of Wills. The will of 1831 corresponds to the description of the instrument to be revived in date; the will of 1839, to the description of the contents. The question, properly put, is not which will the testator intended in his own mind, but which will the clause in the will of 1844 most properly designates, with reference to the contents of all the three instruments, and to all other facts and circumstances which, according to the rule of construction, I am at liberty to take into consideration.

One of the admitted rules of construction is, that every claimant under a will has a right to require that a Court of Construction shall place itself in the situation of the testator, the meaning of whose language it is called upon to declare.* Then, what would be the consequence of decreeing probate of the will of 1831? Why, manifestly to destroy, in many respects, the operation of the will of 1844, and to throw, contrary to the expressed intention of the testator, the whole of his testamentary intentions into utter confusion, which, from the contents of the will of 1844, it is manifest he could not and did not contemplate; whereas, on the other hand, to reject that construction, and hold that the clause of 1844 applies to the will of 1839, would carry into effect the testator's intentions. Would not the testator have said, "I meant by the description in the clause of the will of 1844 the will of 1839?" The question is, whether the Court is not at liberty, within the rules of construction, so to interpret it. I have looked in vain to see whether there is any rule or any case to prohibit me from adopting such an interpretation.

What, after all, is a devise in a will, but a description of the devisee and thing devised? and what is a revocatory clause, but a description of the instrument revoked, and of the instrument, if any, intended to be revived? and are not doubts in both cases to be solved in the same way and by the same rule?

* Wigram, p. 76.

The description of a will by its date cannot be more conclusive than the description of a devisee by name; and how, when a doubt arises as to the person meant as devisee, is the case treated by a Court whose duty it is to construe the instrument? It has been and is a maxim of construction, that *veritas nominis tollit errorem demonstrationis*;* and so, in this case, it might be said that the *truth* of the date must do away with the *error* in the description. But see how Mr. Baron Parke, expressing the opinion of all the judges, and, as I think, very lucidly, spoke, in the case of *Lord Camoys v. Blundell*:† “It may be conceded that, where a devisee is described by his Christian and surname, and some other distinctive circumstance, and no person answers both descriptions, and there is nothing in the rest of the will or the admitted evidence to show who was meant, the name would prevail, and the descriptive circumstance would be rejected. But the maxim, ‘*veritas nominis tollit errorem demonstrationis*,’ is not inflexible, as has been explained by Lord Chief Justice Gibbs, in the case of *Doe v. Huthwaite*.‡ For, if it be clear, upon the due construction of the will, with reference to the evidence of the state of the family, as known to the testator, that the meaning of the testator, as expressed by the will, was that the person described, and not the person named, was to take, the description will prevail over the name; for the rule in question has no other object than to assist in discovering the meaning of the will, and is not applicable where it leads to a construction contrary to the expressed meaning of the testator. Here, then, the question would be, supposing even this were a devise for a person by name, whether the context and the evidence of the state of the family do not cause the description to prevail over the designation by name? We think the context, coupled with that evidence, clearly denotes that the name of ‘Edward’ is a mistake.” Lord Lyndhurst says: “So that it was a question of de-

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Hempenstall.**Camoys v.
Blundell.*

* Bacon's Maxims, 25.

† 1 Cl. & Finn., Ho. Lords Ca., 786.

‡ 2 B. Moore, 323.

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*Thomson v.
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scription, and one part of the description being inconsistent with the rest of the description, the question was, which part of that description, taking the whole together, ought to prevail. Upon that ground the judges have decided, and upon that ground my opinion is in conformity with the opinion which they have expressed." He adds: "We were bound by the evidence, as it appeared to us, and upon the evidence we were of opinion that the description, which is in conformity with the conclusion to which the learned judges have come, ought to prevail, having no doubt of what the testator's intention was."

It appears to me that this authority, confirmed by the opinion of the Lord Chancellor, supported also by the opinions of Lord Lyndhurst and the Vice-Chancellor, enables me satisfactorily to dispose of this case. For, surely, if the context and evidence may cause the description to prevail over a designation by name of a devisee, the context and evidence may give preponderance to the description in a testamentary instrument over the date inserted by the testator.

I am well aware that the description in the clause of the will of 1844 has been attempted to be impugned by pleading that there were no special instructions for the word "exclusively," and that Mr. Phillips has been examined to prove the averment; but in whatever way I view that part of the case, my opinion remains unchanged. For, first, I doubt greatly whether I can receive any evidence to show that there were no instructions for the word "exclusively": and, secondly, if I could, it would not follow that the testator did not read the paper, and approve of the word "exclusively" being inserted. It is not to be supposed that he gave special instructions for the precise words; a testator gives, as this testator did, general instructions, and does not dictate to his solicitor the precise terms he should adopt in carrying his intentions into execution, and nothing would be more dangerous than to entertain the idea that the Court would receive evidence as to the precise terms, in order to exclude some word from a will, because the testator had not specially directed that that term should be made use of,

which would go beyond his intentions. But, again, supposing that evidence to show that the word "exclusively" was inserted without instructions, and even to show that the testator did not know of its insertion; and, still more, that I should be justified in striking out that word from the will, and of course excluding it from the probate,—I say supposing all this,—for I put it only hypothetically, and not with the idea that I could adopt such a proposition,—what would be the result? Why this, and this only; that the descriptive words would apply with less stringency to the will of 1839 than with the word "exclusively" inserted. But still the words which relate to the reversion of the Tong Castle estate would apply much more strongly to the will of 1839, which relates to such estate exclusively, than to the will of 1831, which does indeed dispose of that reversion, but only *inter alia*. I should, even on that supposition, entertain no doubt to which will the testator intended to refer. I should think still, that which was *de facto* wholly and entirely correspondent with the description was the instrument referred to, and not the will of 1831, which answered the description in part only.

In addition to the arguments arising from the contents of these three instruments, I have a right, and indeed am bound, to look at the facts and circumstances in evidence in the cause, namely, the inferences to be drawn from the state of the testator's family, coupled with the contents of the will of 1839. Mr. Phillips, in answer to the 8th interrogatory, says: "The deceased had other lawful children besides those inquired of in the 2nd interrogatory; such other children," naming four, "did all respectively die in his lifetime without leaving issue, and they had all died previous to January, 1844." Now every one of these children of the testator, who died between 1831 and 1844, was a devisee or legatee named in the will of 1831; and could it be the intention of the testator to revive an instrument in favour of five or six dead children? It is impossible that it could be his intention to do so. It would be contrary to all probability, I might say to all common sense, to suppose that the deceased intended to revive a will in favour of

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children who were dead before he proceeded to execute the will of 1844.

I am of opinion, therefore, that I ought not to decree probate of the will of 1831 ; and I found that judgment solely on the contents of the will of 1844, the will of 1839, and the will of 1831, and upon the evidence of the state of the testator's family when he made the will of 1844. I leave entirely out of consideration everything else which appears in this cause. I am satisfied that the evidence on which I rely is legitimate evidence, and I refer to none upon which, as I think, the least doubt can rest.

*Payne v.
Trappes.*

I believe that the judgment I now give is consonant to the doctrine laid down by the best authorities, and not, that I know of, opposed to any antecedent decision. The case of *Payne v. Trappes** was adverted to in the Argument ; but that decision does not appear to me in any degree to militate against the conclusions I have come to in this case. Had I entertained any such opinion, I should of course have paused before I came to a final conclusion. I think, however, that a few words will show a clear distinction between the two cases.

In the case of *Payne v. Trappes*, the testator had executed a codicil, dated November 9th, 1839, and declared it to be "a codicil to his will made by Charles Meredith, Esq., of 8, New Square, Lincoln's-Inn, dated 12th May, 1837." Now this description was an accurate description of the will referred to, for there was a will of that date prepared by Mr. Meredith. It was suggested that the will intended by the testator was a will bearing date October 17th, 1838, and that the reference to the will, May 12th, 1837, was a mistake. The principal argument went not upon a question of construction, but upon the testator having destroyed a copy in duplicate of the will of May 12th, 1837. Other circumstances were also referred to as tending to support the averment that such a mistake had been made ; but it appears to me, not only that that case was well decided, but that no evidence could, under the circumstances, have

* 1 Robert. 583. 5 Notes of Ca. 478.

set up the will of 1838 ; because, though evidence of a certain class, namely, of the state of the testator's family and property, might be admitted to declare the meaning of that which the testator had written, of a passage found in the written instrument, which might possibly tend to show that, by the words written, the testator did not intend to publish the will of 1837, yet by no possibility could it be admitted to show that he had published the will of 1838 by those words written in that codicil; there might be evidence *de facto* to show intention, but there could not be legal evidence to show intention carried into effect in that instrument, for there were no words which by possibility could express republication of the will of 1838. Therefore, to have pronounced for the will of 1838 would have been not to give effect and meaning to what was written, but to what was intended to be written, and was not written ; and as, by no legal principle of which I am cognizant, in a will made under the Statute, could the clause in question be struck out, of necessity there was given to it the only meaning the words could bear.

But the circumstances of the present case are different ; because, as I have already endeavoured to explain, the description of the instrument to be revived may apply to the will of May 22nd, 1839, not to the will of 1831, and that by construction only, founded on admissible evidence, without adding to the passage to be construed.

I am not aware of any other case decided in this Court, or in any other Court, to which it is necessary that I should refer. I found my judgment upon very high authority, namely, the decision of the House of Lords. For these reasons I shall pronounce for the will of 1844, and refuse probate of the will of 1831. Probate is not prayed of the will of 1839, because it relates exclusively to real estate ; and, therefore, it is not necessary that I should make any decree relating thereto. The costs of both parties must come out of the estate.

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Thomson v.
Hempstead.

Probate of the
will of 1831 re-
fused.

Proctors:—*P. Fenton*, for the executors ; *Oldershaw*, for the legatee.

High Court of Admiralty.

Ext. Court Day.

JULY 28.

Salvage. — **THE "PURISIMA CONCEPCION" (TRIGO).—Cause, by Act**
 Where a party, asserting himself to be a salvor, but who, as the owners alleged, had been employed simply as agent, had arrested the ship in a cause of salvage, the Court refused to grant a *supersedeas*, on an allegation that the matter in dispute had been by mutual agreement referred to arbitration. — The mere reference to arbitration is not sufficient to bar the jurisdiction of this Court. — Upon the merits: — Held, that the action was maintainable.

on Petition.—This was a Spanish vessel, which, in October, 1848, on her voyage from Norway to Bilboa, with a cargo of fish, meeting with stress of weather, and sustaining some damage, got on shore near Bridlington, where services were rendered to her by Mr. Waters Brambles, agent to Lloyd's, as the owners contended, in the character merely of an agent. On the 10th March he arrested the vessel in a cause of salvage.

Dr. Addams applied for a *supersedeas* of the Warrant, on the ground that Mr. Brambles had no title to sue as salvor, having been employed as agent, in which capacity he had sent in claims, which had been, by mutual consent, referred to arbitration, and the award was then pending.

Dr. Harding, for the salvor. — An agreement to refer is no answer to a suit at law or equity; even an award without payment is no bar. *Mitchell v. Harris.* Thompson v. Charnock.† Allen v. Milner.‡ Street v. Rigby.§* The jurisdiction of this Court is not ousted.

DR. LUSHINGTON.

The question is, whether the Court ought, upon consideration of the facts stated, to supersede the Warrant or not. The two grounds upon which the Court may proceed are these: first, if the Court is satisfied that the Warrant *improvidè emanavit*,—that is, if the vessel has been arrested in a cause of salvage, no salvage service whatever having been performed,—then, as a matter of right, the Warrant would be superseded. I must confess that the question comes before me in a most inconvenient shape to ascertain the fact. I have the affidavit to lead the War-

May 15.

JUDGMENT.

* 2 Ves. j 136.

‡ 2 Cr. & J. 50.

† 8 T. R. 139.

§ 6 Ves. 821.

rant, and certain bills and charges; and I see a great deal in the affidavit which I wish had never been there, and I think there is an omission of much that might have been there. Here is a long history of the vessel up to October, and nothing can be more meagre than the statement in the affidavit as to the salvage services,—“for salvage and other services.” I am aware that affidavits to lead Warrants are not to be expected to be very distinct as to the services; these affidavits are made in a hurry, and at distant ports, and provided they lay a *prima facie* ground for the jurisdiction of the Court, the Warrant must issue; but it issues at the peril of the party, who, if he fails, is liable to the costs incurred. I think, considering what has been the practice in these cases, and that the Court holds in its hand the remedy in case the vessel has been improperly arrested, I am not in a condition to supersede the Warrant on the ground that sufficient cause is not set forth in the affidavit to lead the Warrant.

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—
Parisina
Conspicua.

What is the other ground? That there was an agreement that the whole matter in dispute between Mr. Brambles, the salvor, and the owner, should be submitted to arbitration. Now, it is clear that a mere reference to arbitration is not sufficient to bar the jurisdiction of a Court of Common Law or Equity, and cannot bar this Court, which acts on the same principles. If so, I do not see how I can supersede this Warrant. This Court can only supersede the Warrant, or exercise the jurisdiction belonging to it, on strictly legal grounds. I do not wish to enter into a consideration of the merits of the case, and to say whether I can or cannot exercise jurisdiction,—I leave that question until the conclusion of the cause. Therefore, I decline to supersede the Warrant. The costs must be considered as costs in the cause.

The case was argued on its merits. It appeared that, July 28. when the vessel stranded near Bridlington, she was boarded by some boatmen, and, on the ensuing morning, the master placed the vessel under the care of Mr. Brambles, as ship-

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Concepcion.*

agent, who employed men to unlade her, superintending the operation, but performing no other actual personal service. The vessel having been got off, and conveyed into the harbour, the cargo was sold, and on Mr. Brambles sending in his charges, the accounts were disputed, and afterwards agreed to be referred to arbitration. The reference went off, and Mr. Brambles then instituted the present proceeding against the ship. On the part of the owners, it was contended that Mr. Brambles was not entitled to any salvage reward.

Dr. Harding, for Mr. Brambles, cited the "*Happy Return*,"* and the "*Favorite*."† *Dr. Addams*, for the owners.

JUDGMENT.

DR. LUSHINGTON.

The Court very greatly laments the manner in which this cause has been conducted; for it is perfectly manifest, from the perusal of the proceedings, that very great and perfectly unnecessary expense has been incurred for affidavits of very considerable extent, which have never been sworn to in one instance, and going over ground which it was useless to tread.

The main question is this,—whether the action entered by Mr. Waters Brambles, the agent to Lloyd's at the port of Bridlington, is maintainable or not. That is a question of some importance, and one respecting which, if I had not had a previous opportunity of very carefully considering it since this case first came under the notice of the Court, I should have thought it necessary to take further time before I pronounced my opinion. But a question very similar to it was agitated on the original Act on Petition entered into on behalf of the owners, in which the Court was prayed to stop further proceedings in the cause. I then addressed my attention to that question, and I have since considered it, and referred to the two cases cited in Argument,—the "*Favorite*" and the "*Happy Return*,"—and I have also endeavoured to call to mind other cases

* 2 Rob. jun. 255.

† 2 Hagg. A. R. 198.

that have occurred in preceding times, some of which, I greatly regret to say, took place during an interval of time when cases passed without any report.

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I will first look at the question without reference to the peculiar circumstances of this case, and I will put it upon the wide and clear statement of facts. The case is this: here is a person residing in the neighbourhood of a seaport, carrying on the business of a merchant and ship-agent; a vessel becomes stranded in the vicinity of that port, and the master seeks for the assistance of a person in the character of ship-agent for such aid to the vessel and cargo as, under the circumstances, may be necessary. The ship-agent undertakes that task; he employs the persons actively occupied in performing the service necessary, namely, to take out the cargo, if that is a step desirable, or, otherwise, to get the vessel off the strand on which she is lying, and into a place of safety. He himself personally superintends that service, but does not actively perform any part of the duty, or incur the slightest risk to his own life, or danger to his own person. The question is, whether an individual so circumstanced can or cannot maintain an action in this Court against the ship and cargo so salvaged. Now, that is the general question, and one upon which much might have been said if it had been a new question, as to the Court exercising jurisdiction of this description. I think that, upon a balance of all considerations, independently of authority, it is for the benefit of both shipowners and merchants, who are the proprietors of the cargo, and also for the advantage of persons who carry on the occupation of ship-agent,—one of very great importance in a maritime country like this,—that, upon the whole, it is for the benefit of all parties that there should be a power of jurisdiction in this Court. I say, first, it appears to me to be a protection to the owners of both ship and cargo; for it is not to be supposed that, when the Court takes cognizance of part of the case, it does not, therefore, take cognizance of the whole. The whole subject-matter comes within its jurisdiction; it takes care that no improper expenses shall be allowed, and that nothing is taken in the nature of ship-agency or of

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Concepcion.*The action
maintainable.

Authorities.

salvage which is not fairly earned, and to which the party is not justly entitled. Again; it is a matter of advantage to foreign owners, because it enables them, with great facility, to procure the assistance of persons of this description, who are most useful in effecting and superintending services of this kind; because many a ship-agent might hesitate to undertake a work of this kind upon the mere personal credit of the master or a foreign owner, whom he did not know. Again; look at the ship-agent himself. Supposing that he performs his duty honourably, fairly, and assiduously, he is assured of having a proper reward out of the property which becomes subject to the jurisdiction of the Court, and he is not left to the chance of recovering his reward from a foreign owner or a foreign master. I think these are strong reasons in favour of the jurisdiction itself; yet I do not know that I should have ventured to act on any theoretical reasoning if I had not been supported and upheld by previous decisions of the Court.

There were two cases antecedent to the "*Favorite*," of which I cannot find a trace in any report. Of one I have a very clear recollection, and a very peculiar case it was. There may be some doubt whether Lord Stowell did not go too far; but what impressed it on my mind was this circumstance. It was an application made by a magistrate in Ireland for a reward for salvage services, which consisted in sending police-officers down to protect the cargo, and what impressed it on my mind was, that the gentleman, in making the affidavit, swore that he would not fix the amount, as he could not minutely tell the sum to which he was entitled. Lord Stowell allotted £100. There was another case, on the coast of Kent, in the neighbourhood of Deal, in which a similar question arose. I do not know that Lord Stowell formally decided the question,—for he was not in the habit of doing so if he could avoid it,—but he said, "How could there be a better jurisdiction to determine it than the Admiralty Court?" The question arose in the case of the "*Lord Cranstoun*;"* but in the case of the "*Happy Return*"

* Cited, 2 Hagg. A. R. 207.

the whole question substantially came under the consideration of Sir Christopher Robinson, and that learned judge bestowed upon it every possible care and attention which the importance of the question required; and though, of course, the circumstances of each case must differ one from the other, the result of Sir C. Robinson's decision was, that a person might act as an agent and claim as a salvor, though he did not actually perform in person anything, strictly speaking, in the nature of salvage service. He referred especially to the case of the "*Lord Cranstoun*," and he awarded a gratuity to the party suing, whose character of attorney was not to supersede his claim as salvor. I followed the authority of Sir C. Robinson in the case of the "*Favorite*," and there is one observation to which I will advert, not because it is an opinion of my own, but because it shows the view of the question which I then entertained, and to which I think it my duty to adhere. I said, "Although I cannot view Mr. Davey's services in the strict character of salvage services, but rather of a successful and meritorious agency, I am of opinion," &c. In that case, Mr. Davey had performed no act which, properly speaking, could be called an act of salvage. The general principle I am inclined to uphold, and I now look to the particular circumstances of this case, to see if they will induce me to make any distinction.

With regard to the original affidavit to lead the warrant, certainly that is in a very unsatisfactory form, because, in the first instance, it states through three or four pages a great number of circumstances, which never should have found their way into an affidavit merely to lead a warrant of arrest; and in the next place, it speaks of salvage services only for which a debt was due. It is well known that the ordinary form is to make an affidavit that salvage services have been rendered, and the warrant goes out, leaving it to the Court to do justice hereafter; and for this reason: in many instances, unless the warrant issued immediately, the vessel might be gone, and the opportunity of doing justice lost. I do not think that there is much in the affidavit which can affect my judgment in this case.

JULY 28.

Purísima
Concepcion.

JULY 28.

*Parishia
Concepcion.*

But there is a great deal of truth in the argument, that there was great delay, and that Mr. Brambles claimed exclusively in the first instance under the title of agent; but that does not appear to me to be a bar to the action. I lament the delay, but there are many circumstances which may account for it, and unless Mr. Brambles be legally barred from proceeding in a suit which I have decided he had a right to commence, it is impossible that I can reject his claim altogether.

Another question might arise in this case,—the proceeding is against the ship alone, and it is perfectly manifest that the Court cannot do justice as the case stands. I could not decide that Mr. Brambles was entitled to reward, supposing I had a *constat* of the value of the ship, without taking notice of the cargo, because it appears that he had possession of the cargo, and sold the cargo; and he might have paid himself, not merely the commission, and the salvage due upon the cargo, but a great deal more than the Court would have given upon the whole. In this state of things, I hold my hand, and say that, until the whole matter is investigated, I will proceed no further.

It has been said that Mr. Brambles might be doubly paid,—as agent and as salvor. But if an agent chooses to come into this Court for justice, he must be satisfied with that justice which the Court will administer. If he says, "I have acted both as agent and salvor,—pay me," the Court will take cognizance of what he has received as agent, and will not give him a double reward, but it will take a view of all the services he has rendered, and give a reward in proportion to what he has done, and no more. Every suitor who comes into this Court and *claims* justice, must be prepared to *do* justice.

A reference
of all the ac-
counts.

Looking at these facts, it is clear that I cannot proceed to make any decree whatsoever, except in the dark; therefore, the order I shall make is this,—to refer to the Registrar and Merchants all the accounts, including those exhibited, and the moneys received and paid, with reference both to the ship and cargo. If it should so happen that Mr. Brambles is in possession of the proceeds of the cargo,

he must account to the Court for everything he has paid and received, and he must satisfy the Court that all the payments are just and fair. Unless this is done, he will get nothing in the nature of a reward for his services. When that has been done, if the Court is satisfied that the account has been fairly rendered, and that no expenses have been incurred which ought not to have been, then the Court will ascertain what remains, and will be prepared to give such remuneration as the justice of the case requires. Surely, the owners cannot object to this. They will have the benefit of a proper investigation of all the claims against the ship and cargo, the means of obtaining the proceeds of the cargo if they have been unjustly withheld, and they will pay no more than, according to the judgment of the Court, is a just reward for the services rendered.

Until then, I reserve all questions, including that of costs.

Proctors:—*Smale*, for the party proceeding; *Coots*, for the owners.

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*Parisina
Concepcion.*

Questions reserved.

Archies Court of Canterbury.

AUGUST 2.

Add. Court Day.

GORHAM v. THE BISHOP OF EXETER.—*Cause.*—This was a proceeding, promoted by the Reverend George Cornelius Gorham, Vicar of St. Just, in the county of Cornwall and diocese of Exeter, against the Lord Bishop of that diocese, for having refused to institute him to the Living of Brampford Speke, in the county of Devon, and the same diocese.

On the second Session of Trinity Term, 1848 (June 3), the Proctor for Mr. Gorham, having brought in an affidavit, prayed a Monition against the Lord Bishop of Exeter, to admit and institute him to the Vicarage and parish Church of Brampford Speke, to which he had been duly presented

In a proceeding by a clerk presented to a benefice against his diocesan, for refusing to institute him thereto, it being alleged, in return to a Monition, calling upon the Bishop to institute, or to show cause for refusing, that the presentee had,

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upon examination, been found to maintain doctrines contrary to those of the Church of England, inasmuch as he held that infants were not regenerated by Baptism:—

Held, that the spiritual regeneration of infants at Baptism is the doctrine of the Church of England; that to hold that a preventient act of Grace must render them worthy recipients, is contrary to that doctrine, and a sufficient cause for refusing institution.—The time which the 95th Canon gives to the bishop, namely, twenty-eight days after tender of the presentation, to inquire into the sufficiency of a presentee, is not an absolute limitation, rendering an examination after that period null; the bishop (who inquires as an act of duty, in the fulfilment of a public trust)

by Her Majesty, otherwise to appear and show cause why he should not be admitted and instituted thereto by this Court, with intimation; twenty-eight days having elapsed since he had called upon the Bishop to institute him.

Sir J. Dodson, Q.A., in moving for the Monition, observed that the proceeding was an unusual one, but it was in conformity to books of authority and the Canons of the Church, citing the 95th Canon.

THE COURT directed the Monition to issue.*

* The following is the form of the Monition:—

“Herbert Jenner Fust, Knight, Doctor of Laws, Official Principal of the Arches Court of Canterbury lawfully constituted: To all and singular Clerks and literate persons whomsoever and wheresoever in and throughout the whole Province of Canterbury, greeting. It has been declared to us, in our office aforesaid, on the behalf of the Reverend George Cornelius Gorham, clerk, that he is aggrieved, as his complaint to us sheweth, inasmuch as, although the Vicarage and parish Church of Brampford Speke, in the county of Devon, diocese of Exeter, and Province of Canterbury, has been for the last twelve months, or thereabouts, and still is, vacant and without a vicar, by the natural death of the Reverend — Mudge, clerk, the late incumbent thereof, and although the said Reverend George Cornelius Gorham, clerk, was and is rightly and duly presented to the said vacant Vicarage and parish Church of Brampford Speke aforesaid, by Her Most Gracious Majesty Queen Victoria, the true and undoubted patron of the said Vicarage, and although the said Reverend George Cornelius Gorham exhibited and tendered, in due time and place, Letters of Presentation to the aforesaid Vicarage, under the Great Seal of Great Britain, to the Right Reverend Father in God, Henry, by Divine Permission, Lord Bishop of Exeter, and hath claimed to be admitted with all convenient speed to the said Vicarage and parish Church aforesaid, and to be instituted into and invested in the Vicarage of the same, together with all its rights, members, and pertinents, according to the power, form, tenour, and effect of the aforesaid Letters of Presentation, and that he be intrusted with the cure and direction of the souls of the parishioners thereof, and that he be inducted into and charged with the real, actual, and corporal possession of the said parish Church, and all its rights and pertinents: and although the said Reverend George Cornelius Gorham, clerk, has sought and demanded with all earnestness and humility more than once, or at least once, that right and justice be done to him in the premises, by the said Right Reverend Father in God Henry, by Divine Permission, Lord Bishop of Exeter, and although he has offered himself ready and prepared to subscribe the three Articles,

as

An appearance was given for the Lord Bishop, on whose behalf an Act on Petition was brought in, which alleged as follows :—

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being entitled
to a reasonable
time for the ex-
amination.

as required by the Thirty-sixth Canon on that behalf, to make the Declaration required by the Act of Uniformity, and to take all necessary oaths as by law required, and although the said Reverend George Cornelius Gorham, clerk, was, and still is, capable and duly qualified, as well by his private character, age, and learning, as also by the purity, probity, and integrity of his life, to be instituted into, invested in, and admitted into the said Church, with all its rights, members, and pertinents, and for such and as such he was and still is called, held, considered, accounted, and reported to be, openly, publicly, and notoriously: nevertheless, the said Right Reverend Father in God, Henry, by Divine Permission, Lord Bishop of Exeter, who was well acquainted with all and each of the premises, and who ought therefore, in virtue of the premises, to have admitted the aforesaid Reverend George Cornelius Gorham, clerk, into the Vicarage and parish Church aforesaid, declined and refused to do right and justice in that behalf, or unjustly and unrighteously (saving always due reverence and honour) has delayed and still delays so to do, to the no small prejudice and inconvenience of the said Reverend George Cornelius Gorham, clerk, the party complaining: Wherefore, the said Reverend George Cornelius Gorham, clerk, has humbly prayed us that we would be pleased to grant him, so far forth as is fitting, a remedy in this behalf, according to the exigency of the law: And whereas we are willing to extend our aid to the said party complaining to us as aforesaid: we do, therefore, hereby authorize, empower, and strictly enjoin and command you, jointly and severally, to monish, or cause to be monished, peremptorily (so far as is befitting his honour and reverence), the Right Reverend Father in God, Henry, by Divine Permission, Lord Bishop of Exeter (whom we do so monish by the tenour of these presents), that he, within the space of fifteen days from the service of this Monition (and of which we assign him five for a first Monition, five for a second, and five for the last and peremptory Monition), admit the said Reverend George Cornelius Gorham, clerk, to the said Vicarage and parish Church aforesaid, and institute and invest the said Reverend George Cornelius Gorham, clerk, in the Vicarage aforesaid, with all its rights, members, and pertinents, and also cause the said Reverend George Cornelius Gorham, clerk, to be inducted into the real, actual, and corporal possession of the same, and also to minister, or cause to be ministered, to the party complaining, in all and each of the premises, and whatever concerns them, as to the law and justice shall appertain; otherwise that if, at the expiration of the aforesaid fifteen days, the said Reverend George Cornelius Gorham, clerk, be not admitted into and invested in the said Vicarage and parish Church

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That, in August, 1847, Mr. Gorham was presented by the Crown to the Vicarage of Brampford Speke, and soon after applied to the Bishop of Exeter for institution, who thereupon

Church aforesaid, and if right and justice shall not have been administered to him in that behalf, you cite, or cause to be cited, peremptorily (with all due reverence), the aforesaid Right Reverend Father in God, Henry, by Divine Permission, Lord Bishop of Exeter, to appear personally, or by his Proctor duly constituted, before us, our Surrogate, or some other competent Judge in this behalf, in the Common Hall of Doctors Commons, situate in the parish of Saint Benedict, near Paul's Wharf, London, and place of judicature there, on or before the sixteenth day after he shall have been served with these presents, if it shall be a General Session, Bye Day, or Additional Court Day of the said Arches Court, otherwise on the General Session, Bye Day, or Additional Court Day of the said Court next ensuing, and show a reasonable and lawful cause, if he have any, why (the right having devolved upon us through such his refusal and denial of justice) the said Reverend George Cornelius Gorham, clerk, ought not to be admitted into the said Vicarage and parish Church of Brampford Speke aforesaid, and be rightly, lawfully, and canonically instituted into the same, with all its rights, members, and pertinents, and inducted into the real, actual, and corporal possession of the same, and justice be administered to him, the aforesaid Reverend George Cornelius Gorham, clerk, in the premises, by us and by our authority, in due course of law (justice so requiring); and that you intimate, or cause to be intimated, peremptorily, to the aforesaid Right Reverend Father in God, Henry, by Divine Permission, Lord Bishop of Exeter (whom we do by the tenour of these presents so intimate), that if he do not appear at the aforesaid time and place, or, appearing, do not set forth a reasonable and lawful cause to the contrary; we, our Surrogate, or some other competent Judge in this behalf, will proceed, and intend to proceed, to admit and institute the said Reverend George Cornelius Gorham, clerk, to the Vicarage and parish Church aforesaid (the absence, or rather the contumacy, of the said Right Reverend Father in God, Henry, by Divine Permission, Lord Bishop of Exeter, notwithstanding): We therefore command you, as above, to inhibit, or cause to be inhibited, peremptorily (with all due reverence), the aforesaid Right Reverend Father in God, Henry, by Divine Permission, Lord Bishop of Exeter, or his Vicar General in Spirituals, and all others in general, whom we by these presents do inhibit, that they or either of them do not, pending the business of this undiscussed complaint, attempt or make, or cause to be attempted or set forth, anything to the prejudice of the party appealing or complaining in and about the premises, or anything respecting them, under pain of the law: And whatever shall be done in the premises you shall duly certify to us, our Surrogate, or some other competent Judge in this behalf,

proceeded to examine him, in order first to ascertain his sufficiency and fitness, as he was both of right entitled and in duty bound to do, as well by the Statutes of the realm as by the Constitutions and Canons of the Church: That it appearing to the Bishop, in the course of his examination, that Mr. Gorham was of unsound doctrine respecting that great and fundamental point, the efficacy of the Sacrament of Baptism,—inasmuch as he held and persisted in holding that spiritual regeneration is not given or conferred in that Holy Sacrament; in particular, that infants are not made therein members of Christ and the children of God, contrary to the plain teaching of the Church of England, in her Articles and Liturgy, and especially contrary to the divers Offices of Baptism, the Office of Confirmation, and the Catechism, severally contained in the Book of Common Prayer and Administration of the Sacraments, and other rites and ceremonies of the Church, according to the use of the United Church of England and Ireland;—the Bishop refused on that account to institute Mr. Gorham to the said Vicarage: That the holding of such unsound doctrine concerning the said Sacrament by Mr. Gorham is a good and sufficient cause of such refusal: That Mr. Gorham hath since written and caused to be printed and published an account of the whole of what passed between the Bishop and himself in reference to, and in the course of, his examination, in a book entitled “*Examination before Admission to a Benefice by the Bishop of Exeter, followed by Refusal to institute, on the allegation of Unsound Doctrine respecting the Efficacy of Baptism; Edited by the Clerk Examined, George Cornelius Gorham, B.D., Vicar of St. Just-in-Penwith, Cornwall, presented Vicar of Brampford Speke, Devon, and formerly (for eighteen years) Fellow of Queen’s College, Cambridge;*” such book containing in full (among other things) the several questions put by the Bishop to Mr. Gorham, in the course of his examination, and Mr. Gorham’s several answers thereto; and, in part supply of proof, it refers to the said book, brought into the Registry.

The Answer, on behalf of Mr. Gorham, after admitting the book brought in to have been published by him, and alleging that the contents are true and accurate, alleges as follows:—

behalf, together with these presents. Dated at London, the Fifteenth day of June, in the year of our Lord one thousand eight hundred and forty-eight.

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That Mr. Gorham, a Bachelor of Divinity of the University of Cambridge, and for nearly eighteen years a Fellow of Queen's College in that university, in 1811 was made a deacon, and in 1812 ordained a priest of the Church of England, from which period he had officiated in six several dioceses as a licensed curate, and has never incurred the reprehension of his diocesan : That in 1846 he was presented by the Crown to the Vicarage of St. Just, which is in the diocese of Exeter, and was instituted by the present Bishop, without any previous examination, and he still continues to hold such Vicarage, and no attempt has been made to deprive him thereof by reason of his holding any alleged unsound doctrine : That, in June, 1847, the Living of Brampford Speke was offered to him by the Lord Chancellor, on behalf of the Crown, and that, for the purpose of facilitating his being presented to such Living, Mr. Gorham, in compliance with the wishes of the Lord Chancellor (though not required to do so by the Constitutions or Canons of the Church), forwarded to the Bishop of Exeter, for his signature, a Testimonial of good conduct and sound doctrine, in the usual form, signed by three beneficed clergymen of that diocese : That the Bishop, having added to his countersignature thereto certain remarks reflecting upon the conduct and expressing apprehensions of the doctrinal soundness of Mr. Gorham, and ineffectual attempts having been made to induce him to withdraw the same, the Testimonial was forwarded to the Lord Chancellor, with the said remarks thereon, and that subsequently Mr. Gorham received his Presentation to the Living, dated 2nd November, 1847 : That, application having been made by Mr. Gorham to the Bishop of Exeter, on the 6th November, for institution, and Mr. Gorham having personally presented himself in Exeter, at the Bishop's Registry, on the 8th, and having then tendered his Presentation to the Bishop's secretary, an appointment was made by the Bishop for Mr. Gorham to wait upon him on the 12th, subject to the convenience of Mr. Gorham, unaccompanied with any allusion to any intended examination of him : That two further applications for institution were made by Mr. Gorham on the 9th and 10th of the same month, and in reply thereto an intimation was for the first time conveyed to him, in a letter from the Bishop's secretary, dated the 13th, that it was the intention of the Bishop to examine him previously to instituting him : That Mr. Gorham repeatedly urged the Bishop to commence his intended examination immediately, but without effect : That, by a letter, dated 15th December, 1847, the Bishop appointed the 17th to receive Mr. Gorham at Bishopstowe, when the time limited by the 95th Canon,

within which such examination shall be made, had expired (more than twenty-eight days having elapsed from the 13th November to the 15th December): That on the 17th December, Mr. Gorham presented himself at Bishopstowe for examination, but nevertheless under verbal protest, which was afterwards reduced into writing at the request of the Bishop: That the examination commenced on that day, continued on the 18th, 20th, 21st, and 22nd, when the examination was suspended, under remonstrance from Mr. Gorham, but it was resumed on the 8th March, 1848, and continued on the 9th and 10th, when it was declared by the Bishop to be ended: That in the course of this examination, 149 questions were proposed by the Bishop, and answered by Mr. Gorham (with the exception of a few, to which he objected): That, in addition to the time so occupied at the Bishop's residence, portions of five other days, between the 30th December, 1847, and the 7th January, 1848, were also employed by Mr. Gorham, at Torquay, in answering questions proposed by the Bishop, and in perusing a book which accompanied them: That, in the examination, each question proposed and each answer given thereto were reduced into writing both by the Bishop's chaplain and Mr. Gorham (with a few exceptions), and that the copy of each question and answer so made was retained by the Bishop: That several conversations also passed from time to time between the Bishop and Mr. Gorham during such examination, and having special reference to the same, certain of which were, by agreement, in like manner, reduced to writing: That in the book brought into the Registry is contained a full, true, and accurate account of all the questions put and answers given in the examination, and also of the conversations before mentioned so reduced to writing, together with the protest and remonstrances made by Mr. Gorham; also copies of the Testimonial forwarded to the Bishop, and of his remarks appended thereto; of certain letters, and of the Presentation of Mr. Gorham to the Vicarage: Wherefore, by reason of the premises, and referring to the contents of the said book (to be further verified by Mr. Gorham, if need be), it denies that the Bishop was of right entitled, either by the Statutes of the realm, or by the Constitutions and Canons of the Church, to proceed to examine Mr. Gorham at the time when such examination began, on the 17th December, 1847, twenty-eight days after the Presentation was duly tendered having expired, contrary to the true intent and meaning of the 95th Canon: That although Mr. Gorham submitted to the examination, yet that he did so under protest, and out of respect merely to the Bishop, but nevertheless reserving to

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himself the right to make all legal objections to the proceedings of the Bishop in due time and place: it distinctly and emphatically denies that Mr. Gorham, in his examination, did maintain, or has at any time maintained, unsound doctrine respecting the efficacy of the Sacrament of Baptism, or that he has held or persisted in holding any opinions thereon at variance with the plain teaching of the Church of England in her Articles and Liturgy: it further explicitly and expressly denies that Mr. Gorham held that infants are not made in Baptism members of Christ and the children of God: it alleges that Mr. Gorham did not maintain any views whatsoever contrary to the true doctrine of the Church of England, as dogmatically determined in her Articles, familiarly taught in her Catechism, and devotionally expressed in her Services, it having been his desire and endeavour, throughout his examination, to explain the language both of her Articles and Liturgy (in compliance with the express directions of the Church herself) by such "just and favourable construction" as would secure an entire agreement not only of each with the others, but of all alike with the plain tenour of Holy Scripture, declared by the Articles to be of paramount and absolute authority: lastly, it alleges that Mr. Gorham on several occasions presented himself to the Bishop for institution ready and prepared to subscribe the three Articles, as required by the 36th Canon, and to make the Declaration required by the Act of Uniformity, in the words prescribed by that Act, and that there is not contained in the said examination, or to be fairly inferred therefrom, any just or legal ground for the refusal of the Bishop to institute Mr. Gorham.

The Rejoinder on behalf of the Bishop admits that the examination did commence more than twenty-eight days after the first tender of the Presentation, but alleges that Mr. Gorham neither at the expiration of the twenty-eight days required to be admitted to the Vicarage, nor previous to or at the commencement of the examination, refused or declined to submit thereto, but, on the contrary, expressed himself as being perfectly ready and willing to submit to such examination; it denies that Mr. Gorham has any right now to object to the time of its commencement, and alleges that, from the 20th November, 1847, to the 15th December, the Bishop was out of his diocese, in attendance upon his duty as a Peer of Parliament, by reason of which and of other circumstances, appearing from the correspondence

contained in the book before mentioned, the Bishop proceeded to his examination of Mr. Gorham within a reasonable time after his Presentation had been tendered to him, being all that the law requires the Bishop to do in that behalf, notwithstanding the Canon referred to: it admits that a verbal protest (so called) was made by Mr. Gorham previous to the commencement of his examination, and that afterwards a written protest was drawn up at the Bishop's instance or request.

The preliminary question, raised in the form of an objection, in Mr. Gorham's Answer,—namely, whether, the time prescribed by the 95th Canon (twenty-eight days) having elapsed prior to the examination, the right of the Bishop to examine had not gone, and the examination was not therefore a nullity,—came on for debate.

Dr. Addams, for the Bishop of Exeter.—The Canon in question, for "The Restraint of Double Quarrels,"—premising that, by former Constitutions, a Bishop had two months' space to inquire into the sufficiency of a presentee,—"for the avoiding of some inconveniences," abridged that time to twenty-eight days, and prohibited the granting of a "Double Quarrel," at the suit of any minister, until the expiration of that period. The true object of the Canon is this. Originally, Bishops had an interest in delaying institution of presentees to benefices, first, that they might obtain the profits of the Living during the vacancy (which was prevented by 28 Hen. 8, c. 11), and, secondly, that they might collate to the Living by lapse, against which a Constitution of Archbishop Langton* provided, whereby a Bishop could not delay the admission of a presentee beyond two months, "if he be sufficient." This Canon reduced the term to twenty-eight days, with two views, first to prevent the Bishop, by wilful delay, collating by lapse; secondly, to restrain the issue of a *Duplex Querela* to the prejudice of the Bishop's rights, if the presentation were not tendered in due time. But it is not to be construed as if it prescribed a peremptory limit of twenty-eight days for the commence-

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* Lyndw. De Inst., b. 3.

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ment of the examination of a presentee. All the text-writers allow the Bishop a "reasonable" or "convenient" time for examining the sufficiency and fitness of the Clerk. Gibson.* Degge.† Watson.‡ Ayliffe.§ Godolphin.|| The Canon itself imposes no penalty upon the Bishop if he does commence the examination after twenty-eight days, nor does it declare that the examination, if had, shall be void. Suppose a presentee to a benefice should be schismatic or an Atheist, if the twenty-eight days have elapsed, is the Bishop bound to institute him? Even if the examination was irregular, *fieri non debet, factum valet*. The delay was quite as much for the convenience and at the instance of Mr. Gorham as of the Bishop; he submitted to the examination, and cannot now, after being pronounced unfit, turn round and say the Bishop had no right to go into the inquiry.

Dr. Robinson, on the same side.—The very heading of the Canon shows that it was framed not for the purpose for which it is now invoked, but *alio intuitu*;—not to restrain Bishops from examining presentees, but to protect the rights of patrons and diocesans. The "inconveniences" which it was intended to remedy are those referred to in the old Constitutions. The Canon is merely declaratory, and no *laches* being imputable to the Bishop, who did not exceed a "convenient time," consistent with his public duties, the examination is good in law.

Dr. Bayford, for Mr. Gorham.—The Constitution of Archbishop Langton requires the admission of a presentee by the Bishop within two months, "*dum tamen idoneus sit*." The right of examination "*de idoneitate Personæ*" is, by the *Articuli Cleri*,¶ declared to appertain to a Spiritual Judge, and Lord Coke** says "This *idoneitas* consisteth in divers exceptions against persons presented: 1, concerning the person, as if he be under age, or a layman; 2, concerning his conversation, as if he be criminous; 3, concerning his inability to discharge his pastoral duty, as if he be un-

* Cod. 804.

† Cl. Law, 212.

‡ Rep. Can. C. 24, s. 3.

** 2 Inst. 631.

† Pars. Counsell. 8.

§ Parer. 299.

¶ Stat. 9 Edw. 2, St. 1, c. 13.

learned, and not able to feed his flock with spiritual food :” in other words, it is confined to “learning” and “morals.” The Canon has given the Bishop twenty-eight days to inquire into these matters, and beyond that time he cannot go. The “reasonable” or “convenient” time is defined, and restricted within that period. It is said the examination, having taken place, is *de facto* good ; but the party expressly by protest reserved his rights, which he could not waive, inasmuch as they involved the rights of the patron. The examination is, therefore, a nullity ; the matter is now in the Court of the Archbishop, and there is ample power to prevent the institution of an improper person to the benefice.

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Dr. Deane, on the same side.—The question depends upon the interpretation of the Canon, which will be assisted by reference to the principles on which Statutes of Limitation are interpreted. According to these principles, there are three questions:—1st. What does the Canon bar ; that is, what is its interpretation ? 2nd. Has Mr. Gorham waived his right to avail himself of it ? 3rd. Was the Bishop under any legal disability of exercising his right ? The words of the Canon are as prohibitory as could be, short of containing negative words. Unless the words “abridge and reduce” and “only” can be taken to be prohibitory, it is not apparent what their meaning is. On the second point, Mr. Gorham has done nothing to waive his rights, and could not waive the patron’s ; and as to the third, the absence of the Bishop from his diocese was no reason why he should not examine a Clerk.

SIR H. JENNER FUST.

Feb. 17.
JUDGMENT.

This proceeding is one not of frequent occurrence, —indeed I may say, in the course of my experience, and of that to which I have the means of access, no such proceeding has been had in these Courts for many years, and I think I may venture to say that, during the last 130 or 140 years, no such case has ever been brought before this Court.

The question arises incidentally, and the merits of the case have not yet been entered into ; all, therefore, that the

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Court has at present to do is, to consider whether the objection taken by Mr. Gorham, in the first instance, and which was to have the effect of putting a stop to all further proceedings in this case, is or is not maintainable.

Although, as I have stated, there have been no proceedings of this kind in these Courts of late years, yet it is quite clear that, in former times, at least, the proceeding was one which was well known to the practitioners of those days. We find it alluded to by writers on Ecclesiastical law; we also find it laid down in books of practice,—Clerke's *Praxis* and Oughton's *Ordo Judiciorum*. Therefore, independently of the Canon referred to, it is clear there was at that time this mode of proceeding, and, I believe, the only one, by which a Clergyman refused institution to a Living to which he has been duly presented can obtain redress. Therefore, although the practice may have fallen in some degree into desuetude, still the remedy is open to a Clergyman who considers himself aggrieved by the rejection of his petition to be instituted.

(After stating the circumstances of the case and the contents of the Act on Petition.)

These are the parts of the case to which the Court feels it necessary at present to refer, for the purpose merely of introducing that which alone calls for its consideration at the present moment, namely, whether the Bishop had a right to call upon Mr. Gorham to undergo an examination after the expiration of twenty-eight days, the time allowed by the 95th Canon, of 1603, which is to this effect: "Albeit, by former Constitutions of the Church of England, every Bishop hath had two months' space to inquire and inform himself of the sufficiency and qualities of every Minister, after he hath been presented unto him to be instituted into any benefice: yet, for the avoiding of some inconveniences, we do now abridge and reduce the said two months unto eight and twenty days only." It is contended that the true construction of this Canon is, that the Bishop was limited—strictly limited and confined—to a period of twenty-eight days, for the purpose of informing himself whether the person so presented for institution was qualified

to be so admitted ; and it is contended that, under that construction of the Canon, the Bishop had no right whatever to call upon Mr. Gorham to undergo his examination, and that everything that passed between the Bishop and him during that examination,—which was submitted to, as Mr. Gorham states, under protest, verbal in the first instance, afterwards reduced into writing,—must be considered as a mere nullity ; consequently, the Court is not entitled to take it into consideration, or to assume, from anything that passed during that examination, that Mr. Gorham did maintain unsound doctrine on the particular point referred to in the Bishop's Act on Petition.

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The heading or title of this Canon is, "The Restraint of Double Quarrels," and the part to which the Court has already referred seems certainly to have nothing to do with that particular point to which the title of the Canon seems to be directed ; it is to reduce the space during which the Bishop was allowed, under the former Constitutions of the Church of England, to inform himself as to the sufficiency and qualities of a Minister presenting himself for institution, and has nothing to do with the restraint of Double Quarrels. But it goes on to state : "In respect of which abridgment, we do ordain and appoint, that no Double Quarrel shall hereafter be granted out of any of the Archbishops' Courts, at the suit of any Minister whatsoever, except he shall first take his personal oath, that the said eight-and-twenty days at the least are expired after he first tendered his presentation to the Bishop, and that he refused to grant him institution thereupon ; or shall enter into bonds with sufficient sureties to prove the same to be true, under pain of suspension of the grantee thereof from the execution of his office for half a year, *toties quoties*, to be denounced by the said Archbishop, and nullity of the Double Quarrel aforesaid, so unduly procured, to all intents and purposes whatsoever." So that here the purport of the Canon is to restrain a party from suing out a Double Quarrel till he shall have made oath that at least twenty-eight days have expired, and that there has been an actual refusal of the Bishop to proceed to institution. The latter part of the Canon, which is an im-

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portant part, has no limitation whatever of the Bishop's right to examine, but it restrains the party, who conceives himself aggrieved by the refusal to institute, from applying for the *Duplex Querela* until after the expiration of twenty-eight days. He could not obtain that *Duplex Querela* till the twenty-eight days had expired, and there had been an oath made by him that the Bishop had refused him. The Canon concludes: "Always provided that, within the said eight-and-twenty days, the Bishop shall not institute any other to the prejudice of the said party before presented, *sub pœnd nullitatis.*"

This Canon was relied upon most stringently in the Argument as absolutely compelling the Bishop to commence the examination and conclude it within a period of twenty-eight days, beyond which period he was not entitled to extend his inquiries.

When the case came on to be argued on a former day, the prayers of the Proctors were not before the Court on this part of the case; they have since been laid before the Court, and the purport of the prayer of the Proctor for Mr. Gorham is, that the Court will pronounce against the right of the Bishop to commence or to continue his examination after the period of twenty-eight days had expired from the time at which his Presentation was offered, and that the Court would proceed to the institution of Mr. Gorham, and to the same effect as prayed in the Act on Petition. The prayer of the Proctor for the Bishop of Exeter is, that the Court will pronounce he has proved his case in fact, and he prayed as in the former part of the Act on Petition.

The question, therefore, is described as one of considerable importance, both to the party and to the Bishop, as to the right to examine, to call Mr. Gorham's doctrine in question, after the expiration of twenty-eight days, and the argument of the learned Counsel goes to the full extent, that, the Bishop being so confined to twenty-eight days, all that passed after that period must be entirely without effect. If this is to be the true construction of the Canon, it appears to me to lead to very important and very serious consequences; for, according to the argument of the learned

Counsel, if it is good for anything, it is good to this extent—that, under all circumstances, the Bishop cannot inquire into the conduct of a clergyman who is presented for institution after twenty-eight days have expired; that whatever may be disclosed to the Bishop after that period, as to the conduct of a clergyman so presented to him for institution,—whether he may turn out an Atheist, whether he has been guilty of the greatest irregularity, or has held unsound doctrine, which may not have been discovered before the expiration of twenty-eight days,—still the Bishop is bound and confined to twenty-eight days, and cannot enter into any inquiry as to the truth of the allegations brought before him. So that, in fact, it would amount to this: that the Bishop must be bound, after that period of time, whatever information he may receive as to the conduct of the party, to proceed to institute him, although the very next day after he has instituted him, he may be obliged, in the conscientious discharge of his duty, to take steps for depriving him of that benefice to which he had been so recently instituted. That is a consequence undoubtedly extremely serious; still the argument must go to that extent, if it is good for anything, and it remains to be considered whether such a construction must be put on this Canon. In order to arrive at a just construction of this Canon, it is necessary to consider the circumstances under which it was issued.

The first thing to be considered is, what is required when a person is presented for the purpose of institution? Of course, the Presentation is tendered to the Bishop, accompanied, generally speaking, by testimonials of good conduct from persons who have been acquainted with the Clerk for many years before, and the Bishop, with these testimonials, may proceed, if he thinks proper,—if satisfied with the testimonials,—to take the necessary steps preliminary to the institution, namely, to receive the subscription of the Articles, the Declaration of conformity to the Liturgy, and the assent and consent to everything contained in the Book of Common Prayer, and if he be satisfied on these points, he may proceed to institute the party. But it is a duty absolutely incumbent on the Bishop to satisfy himself that the

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person is fit and properly qualified for the benefice to which he seeks to be instituted. It is not an act to be exercised at his option ; it is a duty incumbent on him, and has always been so considered, and indeed it is laid down positively by the Canons, that the Bishop shall examine whether the person presented is or is not "worthy of the ministry."* Therefore, the Bishop, in discharge of a public trust, is bound to see that the requisite qualifications of a person so presented to him for the performance of those duties which attach to a minister of the Church of England are possessed by such person.

Now, it seems that, in the case of Mr. Gorham, the Bishop was satisfied, in the first instance, when he was presented to the Vicarage of St. Just, with the testimonials he received. Mr. Gorham had taken a high degree in the University of Cambridge, was a Bachelor of Divinity in that University, and had been in the discharge of the duties of different cures for several years, and he had produced testimonials from persons of great respectability, who had known him for many years, and the Bishop was satisfied as to the knowledge, the learning, the morals of Mr. Gorham, and also as to the soundness of his doctrine, to which these testimonials went, and that he was a fit and proper person to be so instituted ; accordingly, without further examination, upon the faith of these testimonials, the Bishop proceeded to institute him to that Vicarage.

Probably, or possibly I may say, the same course would have been pursued in the present instance, if nothing had passed in the intermediate time between the Bishop and Mr. Gorham ; for if the Bishop was satisfied in the first instance to accept the testimonials, as sufficient authority for him to act upon them, as sufficiently satisfactory with respect to the learning, the morals, the sound doctrine of Mr. Gorham, so, in the present instance, when presented to the Living of Brampford Speke, there is no reason to suppose that the same course would not have been pursued, unless something had intervened to make an alteration in the opinion

* Can. 39.

of the Bishop as to the soundness of Mr. Gorham's doctrine. Whether the Bishop had good or sufficient grounds for that alteration of opinion is not for the Court at present to consider; the only question is, what had the Bishop a right to do? Because it is said that it is very unusual that a beneficed clergyman, once in a diocese, should be called upon to undergo an examination by the Bishop who had instituted him, on being presented to another Living. It may be unusual for a Bishop so to call upon a party to undergo an examination; but if anything occurs in the intermediate time to alter the opinion of the Bishop, and give him a different impression of the qualifications of the Minister so instituted in the first instance, and to suggest to his mind a doubt as to the soundness of the doctrine maintained by that clergyman in the intermediate time, surely there is nothing which can prevent the Bishop at least from calling upon the gentleman to undergo an examination on those points, just as if he had been from another diocese, and it would be strange if the Bishop was bound by what was done on the former occasion to take the same course when circumstances came to his knowledge which, whether right or wrong, induced him to take a different view of the accuracy of the testimonials which had been before exhibited to him. At all events, there was nothing to preclude the Bishop from taking that course, if he thought proper so to do. Accordingly, I find in that circumstance nothing to debar the Bishop from the examination of Mr. Gorham on his being presented to this second benefice.

I do not allude more particularly to what passed in the intermediate time, because that will form a subject for the consideration of the Court in a subsequent part of the proceedings, if the case should arrive at it; but it certainly does appear that, in the year 1846, there was a correspondence between the Bishop and Mr. Gorham, which is contained in this book, and previously, therefore, to the examination in December, which had reference to the views which the Bishop at that time took of the conduct of Mr. Gorham, and certainly, in 1847, when the Bishop had the testimonials laid before him, he added that note to it which

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seemed to imply that he did entertain a very considerable doubt as to the soundness of Mr. Gorham's doctrine; and therefore there were grounds upon which the Bishop so proceeded to an examination, contrary to what is stated to be usual in other dioceses, before his institution to this Living.

The question, as I have said, is so confined as to the mere point of time, that it becomes a little necessary to consider what is the foundation of the rule as at present existing, and whether that rule does necessarily preclude the Bishop from the examination of a clergyman presented for institution after the period of twenty-eight days has elapsed.

I have already stated that the Bishop was bound to inquire as to the sufficiency of the qualifications of the person so presented to him; in the discharge of a public trust, he was so called upon to inquire, and to be satisfied. It is not, therefore, as if it were a mere right and privilege which the Bishop was arrogating to himself; but it is for the public benefit, for the public advantage, that that trust should be executed; therefore, unless there are some stringent rules which would lead the Court to put such a construction on the words of the Canon as is contended for by the learned Counsel for Mr. Gorham, it would be extremely difficult for me to satisfy myself that the Bishop was so precluded from commencing the examination after twenty-eight days, or continuing it after that time.

The arguments adduced by the learned Counsel for Mr. Gorham, on this part of the case, were simply from the words of the Canon itself. Here, it may be observed, there are no prohibitory words—there are no words that say the Bishop shall not examine after twenty-eight days; but the time is abridged from two months, previously allowed by a former Constitution, to twenty-eight days, for the purpose of satisfying himself of the sufficiency and qualities of the Minister. That is the utmost extent to which the words go; therefore, there appears no analogy between the Statutes of Limitation, referred to by the learned Counsel, and the words of the present Canon, because it seems, in all the statutory limitations referred to, the words were in themselves absolutely prohi-

bitory ; there being express words of limitation, which are not to be found in the Canon before us. We also know that, in Acts which refer to proceedings in these Courts, they are also so limited and defined as to leave no doubt whatever as to the meaning and intention of the Legislature in passing those Acts. Several Statutes were referred to by the learned Counsel, in each of which there were prohibitory words : " no action shall be commenced after such a period of time "—" every action to be commenced within so many years afterwards "—" but not afterwards," limiting in express terms the proceedings to a particular period of time. By the 27 Geo. 3, c. 44, no suit for alleged defamatory words can be brought in any Ecclesiastical Court unless commenced within six months ; so it is clear that no suit can commence in these Courts unless within that period : there are direct prohibitory words. By the same Statute, no suit for Fornication can be brought after the lapse of eight months. Again, for Brawling, the same. So the analogy between Statutes of Limitation and the Canon entirely fails, because it was thought necessary—when it was requisite to limit the precise period of time—that the prohibition should be in express terms.

As a Statute of Limitation, the words must be construed strictly, because they are, in fact, an abridgment of former rights. There was no prohibition in law as to the time at which an action might be brought. Persons who had a right of action might sue at any time ; then come the limitations, and these are prohibitions after a certain period of time ; therefore, it is infringing upon the general right of the party who has a right of action. So here the Bishop had a title to inquire and satisfy himself of the sufficiency of the person who was offered for institution to a Benefice before he was instituted to it, and there was no limitation of time prescribed. We all know that the Bishop was, for many centuries, the general incumbent, the universal incumbent, of every benefice in his diocese, and that he received every part of the profits derived from those benefices, after defraying out of what he received the salaries of those who officiated, the deacons and curates appointed. That is laid

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AUG. 2. down by Godolphin, in his *Repertorium Canonicum*,* where
 Gorham v. he cites Selden's *History of Tithes* for the authority on
 Bp. of Exeter. which he makes that assertion. And we all know from the
 universal history of the Church that such was the fact, and
 probably it had continued for several centuries. We also
 know that, in the earlier parts of the history of the Church
 in this country, the Bishop applied to his own use the pro-
 fits of a Living which became vacant, during the time it
 continued so, and there was nothing to compel him to pro-
 ceed to institution under the general law, but it was neces-
 sary to do it by a particular Canon or particular Constitu-
 tion. It appears that, in the year 1222, Archbishop Langton
 issued a Constitution, which was referred to by the learned
 Counsel, in which the period of time during which he was
 entitled to appropriate to himself the profits of a vacant
 living was limited to two months. Before that time there
 was no limitation. The Canon or Constitution is to be found
 in the 3rd book of Lyndwood:† "*Cum enim secundum
 Apostolum et infra: Statuimus, ut si quis ad Ecclesiam ali-
 quam, nullo contradicente, canonicè, Episcopus præsentatum
 ipsum (dum tamen idoneus sit) nequaquam admittere differat
 ultra duos menses.*" So here the Statute—the Constitution
 —ordains that the Bishop shall not delay instituting a per-
 son who is presented to the Living, and properly qualified,
 for a period beyond two months. Before that period, there
 was no limitation whatever; but, after a Living became
 vacant, the profits were sequestered, as they are at the pre-
 sent day, for the Ordinary, the Bishop, to provide for the
 service of the Cure during the period of vacancy, and after-
 wards to pay over the surplus of the profits which remained
 after providing for the Cure and the expense of collating.

This Constitution of Archbishop Langton lays a founda-
 tion for the present Canon. Lyndwood observes in his Gloss:
 "*Hæc constitutio est ejusdem cujus et præcedens, et habet duo
 dicta. Ponit enim Statutum et pœnam non servantis.*" So
 that it laid down a penalty for not obeying it—and we shall
 see what the penalty is. The Constitution goes on: "*Alio-*

* C. 3.

† De Institutionibus.

quin quicquid ex eadem Ecclesiâ post factam præsentationem fuerit forlè perceptum, illi, cùm institutus fuerit, restitatur, quatenus fructus illi ad Episcopum pervenerunt." Here is the penalty. The Constitution lays down the rule, that no Bishop shall defer the institution of the person presented beyond two months; otherwise he shall restore to the persons who shall be instituted to the Living all he had received of the fruits of the Living during the vacancy. That is the penalty. There is nothing here to deprive the Bishop of the right to examine, or to reject the petition of the party to be instituted; but he shall receive no advantage during that period of time in which he shall have delayed institution. And Lyndwood goes on to state what had been the practice in respect to these fruits: "*Potest enim esse quod vacante Ecclesiâ de consuetudine pars fructuum pro tempore vacationis pertinet ad Episcopum, et alia pars ad Archidiaconum, vel alium quæ consuetudo bene valet.*" This is the reason why the Bishop should not be called upon to restore more than he had actually received; the Archdeacon might have received his part, but he was called to restore that which he had received, as he had been the cause of the delay.

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But there is another expression, which shows what the intention of the Constitution was. In the first place, it shows that the Bishop was to examine; because he was not to delay the institution of the person presented beyond two months, "*dum tamen idoneus sit.*" Now the very expression *idoneus* necessarily implies that there must have been an examination by some person (and by the Bishop it has always been), in order to ascertain that the person was *idoneus*. Accordingly, Lyndwood, in his Gloss on the word, states: "*Hoc intelligitur etiamsi non esset expressum. Et nota, ex hac idoneitate quoad beneficium curatum considerari debet inter cetera ætas promovendi, ut scilicet, sit in 25 anno; et quod sit commendandus scientiâ et moribus, ut ibi dicitur. Requiritur etiam quod possit infra annum promoveri ad sacerdotium. Requiritur etiam quod sit constitutus in ordine clericali. Admittendus vero ad vicarium debet esse ad minus diaconus, sic ut proximis ordinibus possit promoveri ad*

AUG. 2. *sacerdotium.*" Then upon the limit "*duos menses*," as that period during which the Bishop was to receive the profits for himself, he says: "*Tum textus ille præsupponat præsentationem esse canonicè factam, personamque præsentatam esse idoneam; quare non ordinavit præsentatum statim debere admitti, cum absque causâ rationabili non debent Ecclesia diu vacare.*" So there was to be a person properly presented, and it is declared why he should be immediately admitted, namely, because it is not right that churches should remain vacant without a reasonable cause. He goes on: "*Credo, quod constituentem movere potuit, quod licet ab initio exceptâ tali præsentatione non appareat contradictor, tamen non debet præsentatum mox admittere, quia inter præsentationem patroni, et admissionem Episcopi, debet cadere temporis intervallum, et hoc propter examinationem quam post præsentationem Clerici sibi factam debet Episcopus facere, et non repentè admittere.*" So that the Bishop is bound to examine the Clerk who is presented for institution before that ceremony takes place.

It was attempted in argument to be urged, that the inquiry was merely as to the *scientia et mores* of the party; but that is not so, according to the doctrine of our law and the doctrine of the Common Law, and the doctrine of the Canon Law, as then understood, because there must be correctness and soundness of doctrine. It cannot be supposed that, however learned a person may be,—however he may give an account of his faith in Latin,—if the account of that faith, given in Latin or in English, is unsound, that would not be an objection to the Bishop's instituting him.

The Canon Law, as I said before, gave two months to the Bishop for the purpose of satisfying himself of the sufficiency and qualifications of the person so presenting himself for institution; but it does not absolutely limit it to that term. It is said that he shall not delay beyond two months; if he does delay beyond two months, that person being *idoneus*, he shall not retain for his own use, as he had previously done, any part of the fruits during the vacancy, but shall restore them to the person afterwards instituted. Nor do I find that there is any difference whatever in the

law as laid down by the different writers upon Ecclesiastical Law. I have looked into Degge, Godolphin, Ayliffe, Watson, and a variety of other writers, and they all declare the necessity there is for the examination by the Bishop, independently of the express words of the Canon, before the institution of a person to a benefice. Godolphin* lays it down in these words, to show the necessity of the examination, and the time allowed, to entitle a party to institution: "Examination is that trial or probation which the Bishop or Ordinary makes before his admission of any person to Holy Orders, or to a Benefice, touching the qualification of such persons for the same respectively." Then, after having stated some circumstances with respect to admission for Holy Orders, he proceeds: "So also when the Clerk is presented by the patron of the Advowson, before he be admitted as Clerk to serve the cure, the Ordinary is to examine him of his ability; for if upon his examination he be found unable to serve the same, or be criminous, the Ordinary may refuse to admit and institute him into the Benefice. By the ancient Canons, the Bishop hath two months' time to inquire and inform himself of the sufficiency and quality of every Clerk presented to him, as appears by the Canon in 1 Jac. c. 95. But by the said Canon it is ordained that the said two months shall be abridged to twenty-eight days only. Upon sufficient inquiry and examination, the Ordinary may accept or refuse the Clerk presented; and, regularly, all such matters as are causes of deprivation, are also causes of refusal." So that, according to this doctrine, referred to by Lord Coke, in *Specol's Case*,† those causes which are causes of deprivation are causes to prevent institution; therefore, mere *scientia et mores* will not be enough, but the Bishop, if he finds there is sufficient cause to deprive a person, may hold it to be a sufficient cause to prevent his institution to a Benefice.

But the great and important point here is, whether the Bishop must enter upon the examination within the period of twenty-eight days? Godolphin says, "Examination of

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* Rep. Canon. c. 24, p. 270.

† 5 Co. 58 (a).

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Gorham v. to this extent, though it is more convenient to refer to
Bp. of Exeter. him,—“for the Ordinary cannot refuse to examine the Clerk during all the six months, and so suffer a lapse to incur to himself; for by so doing the patron should lose his presentation, and the Ordinary take advantage of his own wrong.” So here it seems the intention of limiting the time during which the Bishop is to make the examination was to prevent the lapse of the Living to himself. If he took advantage of postponing the examination of the Clerk so presented to a later period than six months, there might not be time for the patron, upon notice of rejection by the Bishop, to nominate or present a new Clerk to this Benefice. He goes on: “But if the Ordinary, when the Clerk comes to be examined, *sedet circa curam pastorem*, he is not then obliged to leave the business in hand, and presently examine the Clerk; but he may appoint a convenient time and place for the examining of him. This examination by the Diocesan, touching the conversation and ability of such as were ordained to preach the Word of God, or presented to a Benefice, is enjoined by the Provincial Constitutions;” and he refers to Lyndwood, *De Hæreticis*, c. 1. So that, according to this doctrine, a “convenient time” was allowed at Common Law for an examination of a Clerk. Twenty-eight days is the time specified by the Canon to inquire into his sufficiency; but this was not in order to restrict the right of the Bishop, for, if it was a restriction, and must be so construed, it must go to this extent of limitation, that, whatever circumstances may occur, the Bishop must finish his examination within that period of twenty-eight days. But here it is laid down expressly that, when the Clerk comes to be examined, the Bishop is not obliged to leave the business in hand, and examine the Clerk, but may appoint a convenient time and place for the examination. According to the argument of the learned Counsel, if the Bishop were employed, *sedet circa curam pastorem*, if he were engaged in a Visitation or other important matters concerning the affairs of the diocese, he

still must lay aside all the business of the diocese, and postpone that, to examine the Clerk so presented to him within twenty-eight days. Surely that never can be contended for; it cannot be reasonable that all the other affairs of the diocese are to be set aside for the convenience of the person so presented. The reason of the thing shows it never could be the intention so to conclude and limit the Bishop. As it appears to me, the sole intention and purpose for which the first Constitution to which I have referred, and that which is founded upon it, namely, the 95th Canon of 1603, were framed, was to prevent the lapse accruing to the Bishop by his own wrong, by his postponing without cause the examination of the first Clerk presented till a period of time at which it was too late to present a second Clerk, if the first were rejected. According to all the writers to whom I have referred, if the Bishop is engaged in important business, he may postpone the examination beyond that period of time, not so as to give himself the advantage of a lapse that may occur, but for the purpose of fixing that convenient time within which the examination may be completed, without injury to the patron or to the Clerk, and without inconvenience to the Diocesan. It is impossible to contend that these words are absolutely binding and conclusive, and that the Bishop must not only commence but conclude the examination within the twenty-eight days.

This is referred to over and over again in Godolphin's *Repertorium Canonicum*: "The Ordinary is not obliged upon a vacancy to receive the Clerk of him that comes first, for, as he may take competent time to examine the sufficiency and fitness of a Clerk, so may he give convenient time to persons interested, to take knowledge of the avoidance."* This assumes that he is allowed to take a convenient time for the examination.

Another case is referred to in these books on this subject, namely, that the Bishop having neglected,—because it was part of his duty, where he objected to a Clerk for insufficiency,—to give notice to the patron (that he might have

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* C. 3, p. 33.

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the opportunity of presenting another Clerk for institution), for the space of twenty-eight days, it was held that he could take no advantage of that lapse, and consequently it almost of necessity proves that the object for which this limitation of time was assigned was to prevent the Bishop from so taking advantage of the right of examination as to postpone it till the expiration of six months, when the lapse would accrue, and he would be entitled to the Living; and that seems to be the real object for which this period of time was limited.

But it was stated also in argument, that there were motives which might influence the Bishop to prevent institution. I have already stated that it appears, in the Constitution of Archbishop Langton, that it was on that account that the Constitution was framed. But that temptation was afterwards removed still farther. It remained, indeed, in some degree doubtful as to what was the purpose to which the profits of the Benefice were to be applied during the time of the vacancy, for even so late as the 28 Hen. 8, c. 11, we find from the Preamble that some reasons prevailed at that time for delaying institution by the Bishops and the Archbishops of this realm: "Forasmuch as it is not declared who shall have the fruits, tithes, and other profits of the said benefices, offices, promotions, and dignities spiritual, during the time of vacation thereof, divers of the Archbishops and Bishops of this realm have not only, when the time of perceiving and taking of tithes"—which tithes are enumerated—"hath approached, deferred the collation of such Benefices as have been of their own patronage,"—and not only of their own patronage—"but also have, upon presentation of Clerks, made unto them by the just patrons, protracted, and deferred to institute, induct, and admit the same Clerks, to the intent that they might have and perceive to their own use the same tithes growing during the vacation,"—that is, the profits during the vacancies of those Livings for which persons were presented for collation,—those in their own patronage and also those in the patronage of others,—when payment of the tithes was made, in order that they might appropriate to their own use the

tithes so paid: "So that, through such delays (over and above the first-fruits, which be justly due to the King's highness), they have been constrained also to lose all, or the most part, of one year's profits of their Benefices and Promotions, and to serve the Cure at their and their friends' proper costs and charges, or utterly to forsake and give over their Benefices and Promotions, to their great loss and hindrance." Then it goes on to enact afterwards, that the tithes, fruits, &c., growing during the vacation, shall belong to the next person presented, towards the payment of the first-fruits to the King's highness. If they were not restored then, the person retaining them should be liable to a penalty of three times the value of that actually received. So that, up to this period of time, there were several motives which were supposed to have actuated the Bishops and Archbishops in delaying the institution to Benefices of such persons as had been duly and canonically presented. But by the Act of Henry 8, all that temptation was taken away. Then, as I have already stated, if the Bishop defer the examination and the institution to so late a period that there is not time for the party entitled to the patronage to make a second presentation, on the rejection of the first presentee, then the Bishop shall take no advantage of his own wrong, by presenting in consequence of that lapse. This appears to me to be the true meaning and intention of the limitation to twenty-eight days. The party could not insist upon being instituted before twenty-eight days; he may then come to the Court, if delayed beyond that time, for a *Duplex Querela*, and the Bishop may be called upon to assign the cause why he did not institute him; but beyond that it does not go. It does not require, in the form of the prayer made here, that the party should be instituted, because who is to institute him? It is expressly laid down in the Canon, that no person shall be instituted without inquiry made. Now what inquiry have I before me? Suppose the institution fall on me, what information have I before me upon which I can ground any such proceeding? I have neither the Presentation before me, nor the Testimonials; I have no inquiry before me at the present moment; I have nothing

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from which I can comply with the prayer made. I am asked to pronounce that the Bishop had no right to inquire after twenty-eight days; but I have no power to say the party shall be instituted, because I have no *constat* that there has been any examination of this person; and Mr. Gorham could not be entitled to be instituted without inquiry, without examination in such form as may satisfy the Bishop that he is a fit and proper person to be instituted. Under these circumstances, it appears to me quite impossible so to construe this Canon as to say that the Bishop is precluded from entering upon this examination after that period of time.

It appears that the Bishop was summoned to Parliament, which is alleged as the ground for postponing the examination. There is no refusal of the Bishop; he merely postpones the period of examination. The refusal to admit was in March, 1848, the application for the *Duplex Querela* in July, 1848; so that a very long time elapses,—four months,—before the application is made. I have said that the Bishop was summoned to attend in Parliament; and was he bound to abandon that duty, which is incumbent upon him? Was he not, in that respect, *sedens circa curam pastorem*? It is part of the duties which belong to him to attend in Parliament as a Spiritual Peer, as a Bishop of the realm. Was he not engaged in such a matter as justified him in postponing the examination, possibly with some inconvenience, but no real loss, either to the patron or to the incumbent? Loss to the patron there could not be. It is possible that inconvenience to the incumbent there might be, but loss there could be none, speaking with reference to the situation in which the gentleman was placed, namely, holding the Living of St. Just, which is not at present vacated, and he is entitled to the intermediate profits during the vacancy of the Living of Bramford Speke, if he should be instituted hereafter to that. I cannot conceive that there is anything, *prima facie*, on the face of these proceedings, which would lead me to believe that this had been done with any sinister motive on the part of the Bishop. Pecuniary interest he could have none whatever. Of lapse

he could have none, because here there is no lapse; the Living belongs to the Crown. Suppose it had been a case where the Living might have lapsed, then the patron would have had a remedy if the rejection of the Clerk was delayed to so long a period as to disable the patron from nominating another. But the Bishop could obtain no advantage.

I do not enter into the question, as to whether it was for the convenience of Mr. Gorham, or of the Bishop, or of both, to a certain extent, that the examination was postponed. It has been stated that Mr. Gorham had been taken by surprise, for that it was not until the 13th November that he had an intimation of the Bishop's intention to examine him. Whether this be so or not, is not material to the inquiry; but it is impossible to say that Mr. Gorham had been taken by surprise, when we look at the correspondence which took place in the year 1846, on the appointment of a Curate to St. Just. The Bishop insisted upon the examination of that Curate, because he was in doubt of the soundness of his doctrine as to the efficacy of baptism; and after this, and after receiving what the Bishop had written on a testimonial presented to him, subscribed by the clergymen to whom Mr. Gorham was well known as a man of learning, morals, and sound doctrine, I say, it is impossible that Mr. Gorham should be surprised that he was called to undergo an examination. He, however, submitted to the examination, —though under protest, as he calls it,—or went through an examination. What the result may be, I am sure I cannot undertake to say; but here is a book, with 149 questions, together with the answers, set forth at great length, from which the result is to be obtained; and I apprehend, by the result of that examination, Mr. Gorham must be considered as bound, whatever that result may be. But to say that the Court is not in a condition to enter into a consideration of this examination, because it was taken after twenty-eight days, what would the consequence be? Mr. Gorham may have published a book after the twenty-eight days had expired, but before the institution took place, in which the most erroneous doctrines may have been maintained; and could it be said that the Bishop was bound to institute him

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Looking to all the circumstances of this part of the case, —and that is the only matter to which my attention is to be directed,—I am of opinion that no case has been made out, in reference to time principally; because I hold that the rule applied to Statutes of Limitation has no application to the Canon, there being in those Statutes words of prohibition against bringing an action after a certain period of time. I apprehend the real construction of the Canon is, that it is directory; the Bishop shall proceed, having received notice, to examine; but there are no prohibitory words, which confine him within that particular space of time. I think it contrary to all the reason of the thing that such an examination shall be so restricted or confined; unless there were, therefore, positive words prohibiting it after the expiration of twenty-eight days, I am of opinion, on the words of the Canon, that the Bishop was at liberty to proceed. If Mr. Gorham had thought it right to apply at an earlier period for a *Duplex Querela*, he might have done so, and the Bishop would have made a return, which probably would have been, that he had not examined him because he was engaged in other matters, and then it would have been for the Court to consider whether that was a sufficient return. Mr. Gorham does not apply; he produces himself for examination, upon protest, reserving all objections; nevertheless, the examination proceeds.

As to what was said about Mr. Gorham's saving the rights of the patron, Mr. Gorham has nothing to do with it, nor have I. This must be argued elsewhere. If the Bishop has improperly refused to institute the Clerk, that question may be for another Court to consider; and proceedings, I am told, are going on at Common Law on a *Quare impedit*, which is the proper mode of protecting the rights of the patron. But it is the right of the Clerk here, who had been presented, which the Court has to consider. Has he, or has he not, been properly or improperly refused to be instituted? That is the question here to be tried. Counsel say you cannot try that

question, because the examination was taken at a period of time when the Bishop had no right to enter into the inquiry. I am of opinion that he had a right, and whatever may be the result of this volume, which contains the questions addressed to Mr. Gorham, and the answers given by him to those questions, the Court is bound to enter on a consideration of the case, and to form the best opinion it can on the whole, before it determines the question whether Mr. Gorham is or is not entitled to be instituted.

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Upon these grounds, I pronounce, with perfect satisfaction to my own mind, that I must overrule the prayer of the Proctor, that I would hold that the Bishop had no right to enter into the inquiry after the expiration of twenty-eight days; consequently, I cannot proceed to institute according to that prayer.

Objection and
prayer over-
ruled.

The case came on for hearing upon the Act on Petition and the evidence contained in the book brought into the Registry. The Argument occupied six days; *Drs. Addams* Feb. 17 & 27; and *Robinson*, for the Bishop of Exeter; *Dr. Bayford*, for Mar. 2, 4, 8, & 10. Mr. Gorham.*

SIR H. JENNER FUST.

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The case which the Court is now called upon to decide was most ably and elaborately argued in the early part of the present year. The nature of the question to be decided, the vast body of learning which has been imported into the discussion, and the important bearing which the decision may possibly have upon the interests of the Church and of religion, have created a more than ordinary interest

* The Editor has found it impracticable to compress into dimensions compatible with the object of these Notes such a digest as could afford a correct summary of an Argument of this bulk and character, consisting of copious extracts from a prodigious number of works, with comments and constructions, elaborate and often minute, which would be unintelligible without the citations themselves. A bare list of the authorities cited, with references to the passages, would fill several pages. The Argument of Dr. Bayford, the Counsel for Mr. Gorham (embodying the case adverse to the view ultimately taken by the Court), has been published in a volume consisting of 232 pages.

AUG. 2. in the mind of the public, and, as may be well imagined, a corresponding anxiety and sense of responsibility in the Court which is called upon to decide the question. Greatly is it to be lamented when any difference of religious opinion arises between members of the same body, and still more is it to be lamented when the parties litigant before the Court stand in the relation (as in the present case) of a beneficed clergyman and his diocesan. But it is useless to indulge in observations of this kind; it is now too late to derive any advantage from them, the case having arrived at such a stage as absolutely to call for the decision of the Court.

History of the case. The circumstances out of which the present proceedings originated are these: Mr. Gorham, an ordained minister of the Church of England, a Bachelor of Divinity, and therefore of considerable standing in the Church, was presented to the Vicarage of St. Just, in the county of Cornwall, and diocese of Exeter, in January, 1846, by the then Lord Chancellor, exercising the right of the Crown, to whose patronage the Living belonged. On that occasion, Mr. Gorham, on presenting himself for institution by the Bishop, produced such testimonials as to his learning, ability, moral conduct, and sound religious principles, that the Bishop did not think it necessary at that time to subject him to any personal examination, with a view of ascertaining for himself the correctness of the testimonials produced by him. Mr. Gorham, accordingly, entered upon the duties of the Benefice, as Vicar of St. Just, which he still continues to possess. But circumstances having occurred which made it desirable for him to exchange that Living for another, he was presented by the present Lord Chancellor to the Vicarage of Brampford Speke, in the county of Devon, and in the same diocese, of Exeter, as his Vicarage of St. Just. This presentation bears date the 2nd November, 1847, and on the 6th of that month, Mr. Gorham wrote to the Bishop of Exeter, requesting his Lordship to appoint an early day for admitting him to the Benefice, suggesting that, as he was not removing into another diocese, neither testimonial nor the exhibition of his Letters of Ordination was requisite, but at the same time saying that he would cheerfully

comply with his Lordship's wishes, as far as practicable. An interchange of letters thereupon took place between Mr. Gorham and the Bishop's secretary, Mr. Barnes, to which it is not necessary for the Court further to advert than for the purpose of stating that the Bishop declined to institute Mr. Gorham to the Living of Brampford Speke until he had had an opportunity of satisfying himself as to his qualifications and fitness for the charge. That determination on the part of the Bishop appears to have originated from certain expressions which had been made use of by Mr. Gorham in the course of his correspondence with his Lordship. The Bishop, whether rightly or wrongly, conceived some doubts as to the soundness of Mr. Gorham's religious principles, more especially with respect to Baptism, which, in his Lordship's opinion, lies at the foundation of all Christian doctrine. Whether the suspicions of the Bishop had any ground, is immaterial to the present question, the fact being that an examination of Mr. Gorham did take place, and the result of that examination forms the subject of inquiry before the Court.

It may be proper here to state, that the Lord Chancellor, in the exercise of the patronage of the Crown, vested in him by virtue of his high office, very properly requires that the intended presentees to benefices within his gift should produce testimonials from three beneficed clergymen in the neighbourhood in which they reside, and that such testimonials should be counter-signed by the Bishop of the diocese. Mr. Gorham, having obtained a testimonial from three beneficed clergymen, as required, forwarded it to the Bishop for his counter-signature; but his Lordship did not think it right to comply with that request without apprizing the Lord Chancellor of the doubts he entertained as to the soundness of Mr. Gorham's religious views upon certain points of doctrine; and, accordingly, in the margin of the testimonial, the Bishop wrote certain observations. The testimonial is to this effect, dated 12th August, 1847:—

To the Right Hon. the Lord High Chancellor of England.
We, whose names are hereunto written, testify and make known that George Cornelius Gorham, clerk, Bachelor of Divinity, late

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Fellow of Queen's College, Cambridge, now Vicar of St. Just-in-Penwith, in the county of Cornwall and diocese of Exeter, about to be presented by your Lordship to the Vicarage of Bramford Speke, in the county of Devon and said diocese of Exeter, hath been personally known to us from June, 1846, to the date of these presents; that we have had opportunities of observing his conduct; that, during the whole of that time, we verily believe that he lived piously, soberly, and honestly; nor have we, at any time, heard anything to the contrary thereof; nor hath he, at any time, as far as we know or believe, held, written, or taught anything contrary to the doctrine or discipline of the United Church of England and Ireland; and, moreover, we believe him in our consciences to be, as to his moral conduct, a person worthy to be presented to the said benefice.

This was signed by three beneficed clergymen. The Bishop, when this testimonial was forwarded to him for his counter-signature, wrote in the margin of the testimonial to the following effect:—

The clergymen who have subscribed this testimonial are highly respectable; but as I consider the Bishop's counter-signature of such a document, if it be unaccompanied by any remark, as implying his own belief that the party to whom it relates "has not held, written, or taught anything contrary to the doctrine or discipline of the United Church of England and Ireland," and as my own experience unfortunately attests that the Rev. George Cornelius Gorham did, in the course of the last year, in correspondence with myself, hold, write, and maintain what is contrary to the discipline of the said Church; and as what he further wrote makes me apprehend that he holds also what is contrary to its doctrine, I cannot conscientiously countersign this testimonial. H. EXETER.
 August 29, 1847.

The Bishop, therefore, in the exercise of his discretion and of the duty imposed upon him by the law of the Church, thought it right to apprise the Lord Chancellor that, in his apprehension, Mr. Gorham held opinions which were contrary to the doctrines as well as the discipline of the Church of England, and he did not think it proper that he should suffer the testimonial to go to the Lord Chancellor without expressing his opinion as to the fitness of Mr. Gorham for the Benefice to which he had been appointed.

The testimonial, so marked, was then returned to Mr. Gorham, and some correspondence on the subject seems to have taken place between him and the Bishop, who, however, declined to take any other course than that which he had already adopted, and Mr. Gorham, after a time, communicated the whole of the circumstances to the Lord Chancellor by letter, dated the 11th September, 1847, and also in another letter, dated the 21st of the same month. The Lord Chancellor, having considered the statements contained in the two letters, together with the testimonial, and the observations of the Bishop written in the margin, on the 11th October, 1847, informed Mr. Gorham, that he proposed to sign the *fiat* for his presentation, notwithstanding the observation added to the Bishop's signature to the testimonial, declining to enter into the question which had arisen between the Bishop and Mr. Gorham. The Lord Chancellor, on the same day, wrote to the Bishop, stating that he had thought it right to sign the *fiat* for the presentation; that, having received most satisfactory testimonials from various quarters in favour of Mr. Gorham, he did not think it became him to take upon himself the office of deciding between conflicting religious opinions.

As to the propriety of the decision come to by the Lord Chancellor, there cannot be two opinions. As the representative of the Crown, in the dispensation of Church patronage, he deemed it right to satisfy himself, by the best means in his power, of the due qualifications of the person whom he was about to present to the Benefice, and having received testimonials highly satisfactory, though unaccompanied by the usual counter-signature of the Bishop, the Lord Chancellor rightly considered "that whatever power the law gave the Bishop, upon the ground of life or doctrine, over the presentee, must follow and cannot precede the presentation." As I said, the presentation was made out and tendered to the Bishop, who, however, declined to institute Mr. Gorham until he had been subjected to an examination. That the course pursued by the Lord Chancellor was a proper one there can, I repeat, exist no doubt. He had a right to satisfy himself as to the qualifications of Mr. Gorham,

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and having done so, it was quite impossible for him to enter into an examination of his religious opinions, or that the matter could be put into a proper course of investigation until the presentee had been placed in such a situation as would enable the Bishop to proceed to that inquiry which he was invested with the power by law to institute. Whether the Bishop exceeded his discretion, or exercised the discretion with which he is intrusted wisely, by declining to countersign the testimonial, or adding thereto the representation of his impressions as to the qualifications of Mr. Gorham for the Benefice; whether it ought to have been considered simply as a record attesting the respectability of the three Clergymen; or whether he was right in believing that something more than this was due from him, in a document to be forwarded to the Lord Chancellor,—it is not for this Court at present to consider. At the same time, it may at least admit of some doubt, whether the Bishop was not justified in considering his counter-signature as attesting something more than the mere respectability of the clergymen who had signed their names to the testimonial. Be that, however, as it may, the Bishop determined to proceed to the examination of Mr. Gorham, and that examination commenced on the 17th December, 1847, proceeding on the 18th, 20th, 21st, and 22nd, and after an interruption of some duration, it was renewed on the 8th March, 1848, was continued on the 9th, and finally terminated on the 10th March. On the 11th, Mr. Gorham was informed that the Bishop would decline to institute him to the Living of Bramford Speke, and on the 21st March, formal notice to that effect was delivered to Mr. Gorham, assigning as a reason for so declining that he held unsound doctrines, but without entering into any particulars as to the unsoundness of doctrine.

There the matter rested until June, 1848, when a Monition was extracted from the Registry of this Court, on behalf of Mr. Gorham, in which it was set forth that he had been presented to the Living of Bramford Speke, and had offered himself to the Lord Bishop of Exeter for institution; that he was prepared to subscribe the Articles required by

the 36th Canon, to make the Declaration required by the Act of Uniformity, and to take all the necessary oaths as by law required ; that although he (Mr. Gorham) was capable and duly qualified, as well by his private character, age, and learning, as also by the purity, probity, and integrity of his life, to be instituted and admitted to the Living, nevertheless, the Lord Bishop of Exeter, who was well acquainted with the premises, and who ought, therefore, in virtue of the premises, to have admitted him into the Vicarage, declined and refused to do right and justice in that behalf, or unjustly and unrighteously (saving always due reverence and honour) delayed so to do, to the no small prejudice and inconvenience of the party complaining ; and it prayed that the Lord Bishop might be assigned to admit Mr. Gorham ; otherwise that he be cited to appear and show cause why Mr. Gorham ought not to be instituted and admitted into the Vicarage and parish Church of Brampford Speke. The tenor of the Monition was to call upon the Bishop to institute Mr. Gorham within a certain time specified, or to show cause why he should not be instituted, and intimating that, if the Bishop did not appear, or, appearing, did not set forth a reasonable and lawful cause to the contrary, the Judge of this Court would proceed to admit and institute Mr. Gorham to the Vicarage and parish Church aforesaid. This Monition was served upon the Bishop of Exeter, and the Bishop appeared to the Monition by his Proctor, who prayed to be heard on his Petition, the object being to state the grounds upon which the Bishop sought to justify his refusal to institute Mr. Gorham. To that Act on Petition Mr. Gorham put in an Answer by his Proctor ; a Reply was made on the part of the Bishop, and the Act being concluded, the question came to a hearing before the Court, and now stands for decision.

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Before entering upon the merits of the case, the Court must say a word on the manner in which the question has been brought before it. Upon a former occasion, I took an opportunity of saying, that the mode of proceeding, by Act on Petition, was neither convenient nor consistent with practice, and I am not convinced by anything that has sub-

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form of pro-
ceeding.

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sequently occurred that the opinion I then threw out is in any respect erroneous ; on the contrary, I am satisfied that the more formal proceeding by Plea and Proof is not only the most proper mode, but that which is best calculated to bring the real question at issue before the Court. In an Act on Petition, the pleading is vague and loose ; the Answer is consequently vague and loose ; whereas, if the proceeding by Plea and Proof had been adopted, the Court would have had the whole case brought clearly and distinctly to its notice, and the doctrines of the Church of England which are referred to by the Bishop of Exeter would have been specifically and precisely stated, and those points on which it is said Mr. Gorham has impugned the doctrines of the Church of England would also have been laid distinctly before the Court. But, as the case stands, it was, not without foundation, stated, in the course of the Argument, that it is impossible to collect, from the manner in which the examination has been conducted, or to discover, the real opinions of Mr. Gorham on the subject of Baptismal Regeneration,—the question brought before the Court by the Act on Petition ; though I think it is extremely difficult, from the way in which the case stands before the Court, exactly to define the real question which the Court is absolutely called upon to decide.

The evidence which has been produced before the Court,—if evidence it can be called,—is most unsatisfactory, and the mode in which this evidence has been produced is still more unsatisfactory. It consists merely of two short affidavits from Mr. Gorham ; there is no affidavit on the part of the Bishop at all ; but there is a book annexed to his Act on Petition, of between 200 and 300 pages, containing 149 questions addressed by the Bishop to Mr. Gorham and his answers to those questions, upon which the whole case before the Court turns. This book, of itself, can scarcely be considered in the nature of evidence, strictly speaking ; but, without a single explanation being offered to the Court, this book was brought into the Registry, and laid before the Court ; the case came on for hearing, and the Court is to find its way, as well as it can, to what is alleged to be the

doctrines of the Church of England, and to the points on which Mr. Gorham is said to have expressed or entertained opinions contrary to those doctrines. I say again that this is not a convenient mode of proceeding, or a correct mode, according to the forms and practice of the Court. The case came before the Court on a preliminary objection; when that was disposed of, the proceedings ought to have been by Plea and Proof; by Allegation, and Answers, and the examination of witnesses; and you might have pleaded those parts of the book which contained the opinions of Mr. Gorham that are said to be contrary to the doctrines of the Church of England. The law ought to have been specifically pleaded,—the law of the Church, the doctrines of the Church of England, and the points in Mr. Gorham's answers which are contrary to those doctrines. Mr. Gorham's Answers to the Allegation might have been called for; witnesses might have been examined, and Mr. Gorham, if he brought in an Allegation, might have referred to parts of the book in which his Answers showed that his opinions were consistent with, and not opposed to, the doctrines of the Church of England. The Court is well aware of the difficulties in which, owing to the want of precedents on the records of the Court, in cases of this description, the parties may have been placed; but still some directions are to be found in those books of practice to which the Profession are almost daily in the habit of resorting,—Clerke, and Oughton, and other writers upon Ecclesiastical Law. It is laid down by Watson, Godolphin, and Burn, that these proceedings should be by Plea and Proof, and Answers, and the examination of witnesses: the proper form of proceeding is set forth in detail by Oughton and other text-writers. It would be a waste of time, however, to dwell further upon this matter, because both parties have adopted another mode of proceeding. The Bishop brought in an Act on Petition, and annexed the book, said to contain the whole of what passed at the examination, with the questions and answers, protests and remonstrances, and all matters connected with the examination: what is contained in the book produced before the Court is in fact the only evidence in the cause. Both

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parties, therefore, are in a common error, and the Court had no opportunity of correcting it, and of altering the mode of procedure, until the case was ready for hearing, as it had no means of knowing it, the Bishop having brought in his Petition, which was concluded before the Court had seen it, and could give an opinion as to the propriety of the proceeding.

I have already said that, in the Act on Petition, the averments are loose and vague. The Bishop, being called upon to make an Answer to the Monition, appeared by his Proctor, as I said, and his Act on Petition was intended to contain the grounds on which he justified his refusal to institute and admit Mr. Gorham to the Living of Brampford Speke. A question, however, was raised, in the course of the Argument, as to who was to be considered the party proceeding in the cause,—on whom the *onus probandi* lay; and the Court thought it perfectly immaterial whether the Bishop was to be considered as the defendant (nominally he was so, the Monition having been taken out by Mr. Gorham), and the Court thinks it perfectly immaterial on which party the *onus probandi* should be held to lie; but I think Mr. Gorham has made out a *prima facie* case in his affidavit, and in the Monition served upon the Bishop, entitling him to be instituted to the Vicarage unless cause were shown to the contrary. He asserted that he had been presented, which was not denied; that he had offered his Presentation to the Bishop, and that the Bishop had delayed to institute him, notwithstanding that he was qualified by age, by ordination, and by standing in the Church,—by presentation, and by offering to do all that he could be required by law to do,—I say Mr. Gorham made out a *prima facie* case, which called for an answer on the part of the Bishop, to justify his refusal to institute under those circumstances. I am of opinion, therefore, that the *onus probandi* lies on the Bishop, and that Mr. Gorham was not called upon to do more than he has done in the first instance.

The averments in plea.

On behalf of the Bishop, it was represented that Mr. Gorham, having, in August, 1847, been presented by the Crown to the Vicarage of Brampford Speke, soon after applied to the Bishop of Exeter for institution; that his Lord-

ship proceeded to examine Mr. Gorham, to ascertain his fitness to hold the Vicarage, as he was of right entitled and in duty bound to do, as well by the Statutes of the realm as by the Constitutions and Canons of the Church (it was stated in the Argument that, though the right of the Bishop to examine was not denied, the examination, under the circumstances, was an unprecedented act); that it appearing to the Bishop, in such examination, that Mr. Gorham was of unsound doctrine respecting that great and fundamental point, the efficacy of the Sacrament of Baptism,—inasmuch as he held that Spiritual Regeneration is not given in that Sacrament; in particular, that infants are not made therein members of Christ and the children of God,—here is the point on which it is averred Mr. Gorham is unsound,—contrary to the plain teaching of the Church of England in her Articles and Liturgy;—the Bishop refused on that account to institute him; that the holding of such unsound doctrine by Mr. Gorham is a good and sufficient cause of such refusal; that Mr. Gorham has since written and caused to be printed and published an account of what passed between the Bishop and himself in such examination, such book containing in full (among other things) the questions put by the Bishop to Mr. Gorham, and Mr. Gorham's answers thereto; and in part supply of proof, reference is made to the said book, brought into the Registry of the Court.

This was the case as originally set up on the behalf of the Bishop, in justification of his refusal to institute Mr. Gorham; but I say again, it is not clearly and distinctly pointed out to the Court what the doctrine of the Church of England is alleged to be. The Court is forced, therefore, to travel through the whole of the proceedings, and of course through the book, and the various answers to the questions contained in the book, in order to ascertain for itself, as well as it can, the doctrines which are alleged to be the doctrines of the Church of England, as well as those points on which Mr. Gorham is said to hold opinions contrary to those doctrines.

The Answer of Mr. Gorham to the statement of the

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AUG. 2. Bishop is to this effect: first, there is an admission that the book brought in by the Bishop's Proctor contains a true and accurate account of what had passed at the examination ; it further alleges that Mr. Gorham had discharged the duties devolving upon him as a Minister of the Church of England in six several dioceses, as a licensed Curate, for thirty-five years, without reprehension of any of the Bishops in whose dioceses he officiated. I do not mean to find fault with what is here set forth by Mr. Gorham, but there is no imputation upon him of having held unsound doctrines during the whole of this period, and the Bishop himself had been satisfied, in the former instance, with the testimonials produced by Mr. Gorham as to his good conduct, moral character, learning, and fitness to hold the Vicarage of St. Just. Mr. Gorham's Answer then goes on to allege that, on his presentation to St. Just, in 1846, he was instituted by the Bishop of Exeter without previous examination, and no attempt had been made to deprive him of that Vicarage by reason of his holding unsound doctrine ; it alleges the circumstances connected with his presentation to the Vicarage of Brampford Speke, the tender of his Presentation to the Bishop, his application for institution, his examination by the Bishop (referring to the book brought into the Registry for the questions and answers, and also for the correspondence which passed between the Bishop and Mr. Gorham, and other documents), and the refusal of the Bishop to institute him ; it denies that Mr. Gorham, in his examination, did maintain, or has at any time maintained, unsound doctrine respecting the efficacy of the Sacrament of Baptism, or that he has held any opinions thereon at variance with the plain teaching of the Church of England in her Articles and Liturgy ; it denies that Mr. Gorham holds that infants are not made in Baptism members of Christ and the children of God ; it alleges that Mr. Gorham did not maintain any views whatsoever contrary to the true doctrine of the Church of England, as dogmatically determined in her Articles, familiarly taught in her Catechism, and devotionally expressed in her services. I say again that all this is vague and general ; that if the proceeding

had been by Plea and Proof, the doctrines of the Church would have been more specifically pointed out, as well as what Mr. Gorham did hold and maintain. In the Reply, on the part of the Bishop, it is repeated that Mr. Gorham did hold and maintain the unsound doctrines alleged in the Act.

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Now I think the Court is the party who has the greatest right to complain of the manner in which this case has been brought before it, because it is left to find its way as it can through the 200 or 300 pages of this book, and the 149 questions and as many answers, which are so divided and subdivided as to leave the Court in considerable difficulty to determine what are the real opinions of Mr. Gorham, and what are the real doctrines of the Church of England, as maintained by the Bishop of Exeter. The arguments of Counsel have, undoubtedly, thrown considerable light upon these points; those arguments were most learned, most able, and were supported by a vast body of erudition, which was brought to bear upon the question at issue between the parties. The discussion of this case occupied six days,—fifteen hours being the share of Dr. Bayford (the Counsel for Mr. Gorham) out of the thirty-three or thirty-four hours during which the Argument lasted,—of which the Court by no means complains, but, on the contrary, it is extremely obliged to the learned Advocate for the great ability, learning, and diligence which he bestowed upon the case, and for the clear and lucid manner in which he imparted to the Court his views of the question. But the difficulties of the Court have been greatly increased by the arguments of both the learned Counsel, and by the reply of the learned Counsel for the Bishop of Exeter. The Court, must, however, proceed to the consideration of the case, divesting it, in the first instance, of much extraneous matter, which was dwelt upon, very properly, by the Counsel on each side, but which can form no part of the case for the decision of the Court, and can have no weight with it in considering the real question it has to decide.

A good deal has been said as to the conduct of the Bishop . Extraneous
in requiring Mr. Gorham to undergo any examination at all, matters.

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he being already a beneficed clergyman in his diocese, and of whose conduct the Bishop had had sufficient opportunity of forming an opinion. The Bishop's right, certainly, was not denied, but the exercise of it is said to be unprecedented ; and I presume it is not a very common course to pursue, where a clergyman, of long standing, is in possession of a benefice in a diocese, and is preferred to another benefice in the same diocese, that an examination should take place into the learning, moral conduct, and soundness of doctrine of the person whom the Bishop himself had already instituted, and of whose qualifications, it might be presumed, he had been satisfied. But circumstances may occur, and will occur, and the experience of the Court has proved that circumstances have occurred, in which it becomes necessary to inquire into the soundness of the principles and doctrines of clergymen who have been instituted to, and in possession for years of, certain preferments in different dioceses of the country, and whose opinions may have unfortunately, since the time they were instituted in the first instance, undergone alteration. Subscription to the Articles of Religion, in the first instance, and the making the Declaration required by the Act of Uniformity, as the experience of the Court has taught it, cannot be altogether depended upon as proof of soundness of doctrine. The Court has already decided, —and Mr. Gorham has submitted to this decision of the Court,—that the Bishop had the right to proceed to the examination, if he thought proper to do so, and that he was, therefore, justified so far in the course he pursued.

But it has been urged that the Lord Bishop pushed the examination, both in point of matter and of time, beyond what the nature of the case required. It is not, however, for the Court to determine as to the course of examination which the Bishop should pursue. His Lordship is the best judge of the course proper to be pursued ; the length, and purport, and tenor of the examination may very much depend upon the nature of the answers given in the first instance to the questions put by the Lord Bishop. Nor is it for the Court to determine, or to give any opinion, whether there was or was not a greater or less degree of courtesy or

respect exhibited on one side or the other—these are not questions for the Court to determine, or to give any opinion upon; and therefore the Court lays out of consideration all those observations,—not improperly made by the learned Counsel, in the outset of the case,—upon the circumstances which may have led the Bishop to suppose that Mr. Gorham had any unsound views on any point of doctrine or discipline. Whether the Bishop proceeded without sufficient ground, upon bare suspicion, arising in the course of their correspondence; or whether it arose from Mr. Gorham's describing the Church as "a National Establishment," and certain of the clergy as tainted with Tractarian principles;—all this may be very proper for Counsel to insist upon in their arguments, but it would be very improper for the Court to give any opinion upon such matters, which it is not called upon to decide. Again; the Court is not called upon to notice what the Bishop may have said in any one of his Charges (referred to in the course of the Argument), or in any letter addressed by him to his Clergy or to Mr. Gorham himself; or to consider whether it be an offence in the diocese of Exeter to allude to the Church as "a National Establishment," or to refer to "Tractarian errors" in Curates. All these matters do extremely well for declamation, and they are well calculated to raise in the mind of some persons a prejudice against the Bishop, leading them to the inference that he was actuated by improper motives; but they can have no weight with the Court in making up its mind as to the decision which it is called upon to pronounce on the more weighty matter which is the subject of consideration.

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Dismissing, then, all these topics from my mind, what is the question which the Court is called upon to decide? I have read what is stated in the Act on Petition on both sides, and I conclude (and it is admitted) that the question at issue between the parties is, as to the efficacy of Baptism in the case of infants only. It is not a question as to the unconditional efficacy of Baptism in the case of adults as well as of infants; but it is solely confined to Baptismal Regeneration as respects infants. Therefore, I dismiss from con-

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to be decided:Baptismal
Regeneration
of infants.

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sideration altogether the question as to the unconditional efficacy of Baptism in adults, it being admitted on the part of the Bishop that the efficacy of Baptism, in the case of adults, depends on the Faith and Repentance of the recipients; on the sincerity of their professions and promises. But although the question is admitted to be confined to this single point, yet the doctrines as to the effect of adult and infant Baptism have been so mixed up together in the examination and Argument, that it is almost impossible to separate the two, so as to say what part applies to one and what to the other. Indeed, Mr. Gorham says that the Baptism of adults and of infants depends on the same conditions; that the same principles apply to each, and that the questions cannot be dissevered; and the Court is, therefore, still left to find its way amongst the mass of questions and answers in this book, in order to discover what are the doctrines which Mr. Gorham is said to impugn and what he subscribes to—what are the doctrines of the Church, and which of them are said to be impugned by Mr. Gorham.

Now I am particularly anxious to have it distinctly understood, that I guard myself against being supposed to offer any opinion of my own as to the disputed point of theology between the parties. I am not going to pronounce an opinion as to whether the doctrine of Baptismal Regeneration in the case of infants is or is not a true, scriptural doctrine; it is not the duty of the Court, nor within the province of the Court, to institute such an inquiry. All that the Court is called upon to do—all that it can do—is to endeavour to ascertain whether the Church has determined anything upon the subject, and, having done so, to pronounce its decision accordingly. The authoritative declaration of the Church constitutes the law of the Church, which this Court is bound implicitly to follow, without indulging any speculative opinion of its own as to whether that declaration be founded in error or in truth. The Court is to administer the law as it finds it laid down, and is not to give any opinion of its own as to what the law ought to be; and therefore I am most anxious it should be perfectly understood, that, in the observations I am about to make, I shall confine

my attention and direct my observations solely to the doctrine of the Church, so far as I am able to ascertain it, without any intention to extend them to the interpretation of those passages of Holy Writ which are, or are supposed to be, applicable to the effects of Baptism.

The first question raised, and which presents itself to the observation of the Court, is this: Whether the Church has pronounced any opinion, and if so, what opinion, as to the subject under consideration? And this gives rise to another question: From what source is the Court to derive its information as to the doctrines of the Church of England? The Bishop of Exeter imputes to Mr. Gorham that he holds and has avowed opinions as to the efficacy of Baptism which are opposed to the doctrines of the Church, as they are set forth in her Articles and Formularies. Mr. Gorham denies this, and says that his opinions are in exact conformity with those of the Church, as laid down in her Articles, and in perfect accordance with the Formularies of the Church. Mr. Gorham takes his stand upon the Articles of the Church, and contends that his views and opinions are in exact conformity with the Church's doctrines, as dogmatically determined in her Articles, familiarly taught in her Catechism, and devotionally expressed in her Services, explaining the language of her Articles and Liturgy,—thus he qualifies it,—by such “just and favourable construction” as would secure an entire agreement of each with the others, and of all with the Holy Scriptures.

A great deal of learning and ingenuity has been applied to the discussion of this part of the case, as might naturally have been expected, from its bearing upon the ultimate decision of the question. As I said, Mr. Gorham founds himself upon the Articles, and declares he will not be driven from that position; that he will go as far as the Church has expressed her opinion, and that, when the Church is silent, he will not speak.

The next point to be considered is, the questions originally addressed to Mr. Gorham by the Lord Bishop; and it may not be improper to state here what was the course of examination pursued by the Bishop, and the answers he received

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to those questions from Mr. Gorham ; and I think the very first question put by the Lord Bishop to Mr. Gorham does throw some light upon the cause of the protracted length of the examination to which Mr. Gorham was subjected, and the very particular and precise manner in which the Bishop was obliged to frame his questions, in order to obtain from Mr. Gorham direct and specific answers to them. The first question (in page 63 of the book) is : " Prove from Scripture, that Baptism and the Supper of the Lord are severally necessary to Salvation." That is the manner in which the Lord Bishop put the question : " 1st, of Baptism ; 2ndly, of the Lord's Supper." Now it clearly appears that the Bishop did not put this question in the form which would draw out a specific answer from Mr. Gorham, as to the doctrine of the Church with respect to the necessity of the Sacraments of Baptism and the Lord's Supper : whether they were "*severally* necessary to Salvation," is the Lord Bishop's question. Mr. Gorham was perfectly aware of the lapse which the Bishop had made, and his learned Counsel took advantage of the slip, observing that his Lordship was wrong, and was obliged to correct his error in the next question. Mr. Gorham proceeds to answer this question, and answers truly : " I do not find in Scripture that the necessity of Baptism to Salvation is declared in terms *so absolute* as this proposition." I do not find, says Mr. Gorham, in Scripture, that Baptism and the Supper of the Lord are declared to be *severally* necessary to Salvation. Then comes a long discussion upon the subject of Baptism, in which Mr. Gorham makes a reference to the words of Scripture, " Except a man be born of Water and of the Spirit, he cannot enter into the Kingdom of God." He goes on then to say :—

If the allusion be to Baptism (which, however, had not then been instituted), it undoubtedly affirms the necessity of complying with that solemn Institution, where no unavoidable impediment intervenes. Having been ordained of Christ, it cannot be slighted without the awful consequences of disobedience to his express command. But it does not appear to me that the being " born of Water," and the being " born of the Spirit," are so indissol-

lably tied together by this declaration, that each is *equally, and in the same sense*, necessary to Salvation. This view is confirmed by the fact, that the expression, "born again," is used in this discourse, in verses 3, 6, 7, 8, without any reference to being "born of Water," but twice with express mention of being "born of the Spirit," as the great essential requisite. It is confirmed also by verses 16, 17, where "everlasting life" and salvation are positively connected with "belief" in the Son of God, without reference to Baptism; as if for the very purpose of showing that faith is an *indispensable and essential condition*, but that Baptism is only *generally necessary*, a condition to be dutifully performed. Precisely the same conclusion must be drawn from the terms used by our Lord, in his express institution of Baptism: "He that believeth and is baptized shall be saved" (Mark xvi. 16). The *general* connection between the *sign* which he has ordained for admission into his Church, and the *faith* which that sign certifies, is here distinctly affirmed. But our Lord adds: "He that believeth not shall be damned." Here exclusion from everlasting Salvation is grounded, not on the omission of *Baptism*, but on the withholding *belief* in the Son of God. The participation of the Supper of the Lord is stated in Scripture in the same manner, as *generally necessary*, not *essentially* requisite, to Salvation.

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Now the manner in which this question was answered evidently suggested to the mind of the Bishop that he must be precise in the form and terms in which he puts his questions; and, accordingly, his second question he framed in this form: "Does our Church hold, and do you hold, that Baptism and the Supper of the Lord are generally necessary to Salvation,—in terms as absolute as *this* proposition?" Here the word "*generally*" is substituted for the word "*severally*," in the first question. This is Mr. Gorham's answer: "Our Church *does* hold this doctrine, and I hold it, of course."

The third question is: "Does our Church hold, and do you hold, that, by the express words of our Lord, in the text, John iii. 5, 'Except a man be born of water and of the Spirit, he cannot enter into the Kingdom of God,' we 'may perceive the great necessity of the Sacrament of Baptism, where it may be had?'" The answer of Mr. Gorham is: "The Church *states* this in her service for Adult Bap-

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tism ; and the statement ' containeth in it nothing contrary to the Word of God,' " referring to the 36th Canon ; and he concludes : " Your Lordship has already had my subscription to this acknowledgment, on my institution to St. Just ; for my assent to the whole Book of Common Prayer includes my assent to this part of it." So there are direct and precise answers given to these two questions.

In the 4th question he was asked : " In the Homily of Common Prayer and the Sacraments, it is said that, ' According to the exact signification of a Sacrament, Baptism and the Supper of the Lord are visible Signs, expressly commanded in the New Testament, whereunto is annexed the promise of free forgiveness of our sins, and of our holiness and joining in Christ : ' Do you hold this to be godly and wholesome doctrine ? " And the Bishop adds : " This question is proposed in words of the Homily ; not thereby to intimate that you are bound to assent to it, without reserve, because of the authority of the Homilies." Mr. Gorham answers :—

My subscription to the Articles, and among them to the 35th, appears to me to involve a sufficient reply to this question. I prefer, and I claim the privilege of giving my assent to the two books of Homilies generally, as containing "*a godly and wholesome doctrine, and necessary for these times,*" to my basing any particular doctrine upon any detached sentence taken out of those books. In claiming this privilege, I by no means intend to intimate that I " assent with reserve " to this passage. On the contrary, I consider it as expressing a wholesome truth, when fairly construed ; but as it has been often adduced, in controversies on the efficacy of the Sacraments, in a sense in which I do not believe the compiler of that excellent Homily to have written it, my consent could not be given to it by a naked affirmative without explanatory matter. Consecutive questions, framed with a bearing on a particular controversy, replied to without many collateral explanations, might elicit apparent, and *only* apparent, admissions, which would not correctly represent the doctrine of the Church. To prevent the possibility of misapprehension as to my reply to this passage, or others to which I may have to return a similar answer, I add, that I fully assent to the wholesome truth contained in this quotation, *when fairly brought into connection with THE ARTICLES OF OUR CHURCH, on the nature and efficacy of the Sacraments.*

This is the way in which Mr. Gorham has qualified his answer to the 4th question, on the Homily, to which he makes no objection whatever ; he assents to the "wholesome truth" contained in the quotation from the Homily, "when fairly brought into connection with the Articles of our Church, on the nature and efficacy of the Sacraments." These words, "the Articles of our Church," are printed in capital letters, as showing that Mr. Gorham considers the Articles as the standard by which he is to be governed.

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Then follow the questions which raise the point under the consideration of the Court. The 5th, 6th, and 7th questions are put by the Bishop in this manner:—

Q. 5. Does our Church hold, and do you hold, that every infant baptized by a lawful Minister, with water, in the name of the Father, and of the Son, and of the Holy Ghost, is made by God, in such Baptism, a member of Christ, the child of God, and an inheritor of the kingdom of heaven ?

Q. 6. Does our Church hold, and do you hold, that such children, by the laver of regeneration in Baptism, are received into the number of the children of God, and heirs of everlasting life ?

Q. 7. Does our Church hold, and do you hold, that all infants so baptized are born again of water and of the Holy Ghost ?

These questions, I presume, were proposed separately to Mr. Gorham, but he gives his answers to them all conjointly. By way of general introduction, he says:—

As these three questions all imply the same description of answer, I will discuss them together: and, generally, I reply that these propositions, being stated in the precise words of the Ritual Services, or of the Catechism, undoubtedly must be held, by every honest member of the Church, to "contain in them nothing contrary to the Word of God, or to sound doctrine, or which a godly man may not, with a good conscience, use and submit unto, or which is not *fairly defensible*. . . *if it shall be allowed such just and favourable construction as in common equity ought to be allowed to all human writings, especially such as are set forth by authority.*" (Preface to the Book of Common Prayer.)

"If it shall be allowed such just and favourable construction as in common equity ought to be allowed to all human writings." Here it is to be observed that Mr. Gor-

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Gorham v. "nothing contrary to the Word of God, or to sound doctrine, or which a godly man may not with a good conscience use and submit unto, or which is not fairly defensible;" but then he qualifies it by saying, "if it shall be allowed such just and favourable construction as in common equity ought to be allowed to all human writings, especially such as are set forth by authority." Then he goes on:—

Now, the "*just and favourable construction*" of passages like these (occurring in Services intended for popular use), which, *taken in their naked verbatim*, might appear to contradict the clearest statements of Scripture, and of the Church herself, must be sought, chiefly—1, by bringing them into juxtaposition with the precise and dogmatical teaching of the Church in HER EXPLICIT STANDARD OF DOCTRINE, THE THIRTY-NINE ARTICLES; in the next place, 2, by comparing the various parts of her FORMULARIES with each other; and, collaterally, 3, by ascertaining THE VIEWS OF THOSE BY WHOM HER SERVICES WERE REFORMED, AND HER ARTICLES SANCTIONED.

These are the modes, Mr. Gorham says, by which these propositions respecting Baptism are to be explained: by reference to the Thirty-nine Articles; by comparing various parts of the Formularies with each other; and "by ascertaining the views of those by whom the Services were reformed and the Articles sanctioned."

This answer gives rise to a very important question, which was made the subject of a long and learned discussion, in the course of the Argument, namely, whether the opinions and views of those by whom our Church's Services were reformed and her Articles sanctioned can be taken to give a construction to words which, by their import and general and common acceptation, bear a different construction; or, in other words, whether the opinions of the individual Reformers can be taken in opposition to the plain and precise declarations which are made in the Formularies coupled with the Articles of the Church. This formed a great part of the discussion by the Counsel for Mr. Gorham, who employed much learning and argument for the purpose

of showing what were the opinions of the Reformers of our Church, by which, it was contended, the Formularies must be construed.

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I may as well say here what appears to me to be the object for which that learning was intended to be employed. It is said that the Reformers were Calvinists, and entertained Calvinistic opinions; that, being so, the Articles and Formularies, having been framed by them, or under their direction, must be construed with reference to Calvinistic principles, such being the principles of the Reformers, who must be supposed to have been governed by those principles in drawing up the Formularies and Ritual services of the Church, and its Articles; so that whatever be the expressions made use of therein, they are to be taken in a Calvinistic sense, and not in the plain meaning and signification which an ordinary understanding would assign to them. This, I say, gives rise to a very serious question, but to which, at the present moment, I shall not direct my attention, contenting myself with having stated the opinion and argument of Mr. Gorham and his Counsel, that one mode of ascertaining the true construction to be put upon the Formularies and Articles of the Church is by considering "the views of those by whom her Services were reformed and her Articles sanctioned."

Mr. Gorham goes on at great length, in his answer, to explain what his views with respect to the points contained in the three questions are; but it is not necessary for the Court to follow him through the different statements he has made. The purpose for which the Court has now referred to them is to show what the question was which the Bishop proposed to raise; to confine it—and so Dr. Addams seemed to understand—to Infant Baptism, and not to extend it to the Baptism of Adults.

Looking at the mode in which the opinion of the Church is to be ascertained, no one can doubt that (as the Counsel for Mr. Gorham contends) the Thirty-nine Articles are to be first consulted; and if they are not silent on the point; if the meaning of the Articles be clear, and the words not doubtful; if it be there dogmatically laid down what is the

Whence the doctrine of the Church is to be ascertained.

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doctrine of the Church in the matter, there can be no occasion to search further. The learned Advocate referred to the declaration or opinion of Mr. Rogers, Chaplain to Archbishop Bancroft, who says :*—

The purpose of our Church is best known by the doctrine which she doth profess ; the doctrine by the Thirty-nine Articles established by Act of Parliament ; the Articles by the words whereby they are expressed ; and other purpose than the public doctrine doth minister, and other doctrine than in the said Articles is contained, our Church neither hath nor holdeth ; and other sense they cannot yield than their words do import. The words be the same, and none other than erst and first they were. And therefore the sense the same ; the Articles the same ; the doctrine the same ; and the purpose and intention of our Church still one and the same.

There can be no doubt of the propriety of these observations,—that the doctrines of the Church of England are best known by her Articles, — the Thirty-nine Articles established by Act of Parliament ; the Articles themselves by the words in which they are expressed ; the words by the sense and meaning which they import. To the same effect are the passages quoted by the learned Counsel from other writers and authorities,—from Bishop Hall, and from Archbishop Whitgift, who says :† “ It were but a needless labour to make any particular recital of those points of doctrine which this Church of England at this day doth hold and maintain, for they be at large set out in sundry English books, and especially in the ‘Apology of the Church of England,’ and the ‘Defence’ of the same ; summarily also collected together in the Book of Articles agreed upon in the Convocation at London, anno 1562.” To the same effect were the quotations from Bishop Prideaux and Bishop Stillingfleet, the latter of whom observes :‡ “ The doctrine

* The Faith, Doctrine, and Religion, professed and protected in the Realm of England, expressed in the Thirty-Nine Articles (Camb. 1691) ; Pref. s. 35.

† Defence of the Answer to the Admonition (Lond. 1574) ; Preface.

‡ The Unreasonableness of Separation ; Works, 2 vol. (Lond. 1710) ; P. II. s. 1.

of the Church of England is contained in the Thirty-nine Articles; and whatever the opinions of private persons may be, this is the standard by which the sense of our Church is to be taken." And other authorities were referred to, which all go to the same effect.

Prima facie, then, the Thirty-nine Articles are the standard of doctrine; they were framed for the express purpose of "avoiding of diversities of opinions;" they are to be considered as the dogmatical teaching of the Church of England, and are first to be appealed to, in endeavouring to ascertain the doctrines of the Church. But if they fall short, or are silent on any particular point, to what are we then to resort? Are we to resort to the opinions of those by whom the Articles were framed and the Formularies compiled, or are we to appeal to other declarations of the doctrine of the Church? We have it, I think, most clearly and distinctly stated by high authority, the authority of Bishop Burnet, in his *Pastoral Care*,* that—

The truest indication of the sense of a Church is to be taken from her language, in her public Offices: This is that which she speaks the most frequently and the most publicly; even the Articles of Doctrine are not so much read and so often heard as her Liturgies are; and as this way of reasoning has been of late made use of with great advantage against the Church of Rome, to make her accountable for all her public Offices in their plain and literal meaning, so I will make use of it on this occasion. It is the stronger in our case, whose Offices being in a tongue understood by the people, the argument from them does more evidently conclude her.

And a similar doctrine is held by Dr. Waterland, whose authority has never been questioned:—

The Church's public acts are open and common, and he is the best Church-of-England man that best understands the principles there laid down, and argues closest from them. The rest are but assertions, fancies, or practices of private men, and are not binding on us.

* A Discourse of the Pastoral Care (Lond. 1692), c. vi. p. 53.

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Arg. 2. And to the same effect Bishop Conybeare speaks,* as to the mode in which ambiguities of language are to be solved:—
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If words, singly and separately taken, are loose and indeterminate, yet their sense may be fixed by the circumstances of the Article in which they are found; and expressions, of themselves doubtful, may become certain, by considering their coherence with other parts of the proposition.—But if expressions should occur which cannot be determined by passages in other Articles, then will it be proper to inquire, whether they may be fixed by our public Liturgy, or by any other monuments which have the sanction of Ecclesiastical authority. The propositions set forth in any of our Articles ought to be understood in such a sense as is consistent with every other determination of the Church; because the Church cannot be supposed to intend one thing in some of her public acts, and the direct contrary in others: to which we may add, that those who subscribe the Articles of Religion are obliged to admit those other determinations also, and consequently must subscribe them in such a sense as will make them agree and be consistent with each other.—Where the meaning of the Articles is already fixed by some public act of the Church, there no liberty can be allowed of altering the sense of it, and of adjusting it to our own interpretations of Scripture.—He who subscribes one Article equally subscribes the rest, and what is more, equally professes submission to every other determination of the Church.

These are authorities which, I think, not only from the weight due to the opinions of such men as those I have referred to, but because they agree with common sense,—the soundest sense,—justify me in saying that these are the true criteria by which doubtful or ambiguous expressions in the Articles are to be construed, and which must guide us when the Articles are silent on any particular point. I understand the same doctrine to have been held by Lord Brougham, in delivering the opinion of the Judicial Committee of the Privy Council, in the case of *Escott v. Mastin*,† who observed, “The question,”—which was as to the validity of lay Baptism,—“is not to be decided by a reference

* On Subscription to Articles of Religion; in Randolph's *Enchiridion Theologicum* (Oxf. 1792); 3 vol. pp. 262, 263, 267.

† 4 Moo. P. C. C. 104. 1 Notes of Ca. 597.

to the opinions, however respectable, of individuals eminent for their learning, or distinguished by their station in the Church." That was a legal decision that the Articles of the Church, the Rubrics, and public declarations of the Church, are the sources from which the law of the Church is to be supplied; and that the opinions of private individuals, however eminent for their piety, their learning, and other qualities, are not to be entitled to weight or consideration with the Court, which must look simply at the public acts and declarations of the Church.

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Under these circumstances, the question is this: Is there anything doubtful in the present case upon which it is necessary to refer to other authority than the Thirty-nine Articles, on the question as to the effect of Baptism?

The Articles which were particularly referred to are the 25th and the 27th, to which we must apply the rule of construction I have stated. Construction
of the Articles.

The 25th Article is to this effect:—

Sacraments ordained of Christ be not only badges or tokens of Christian men's profession, but rather they be certain sure witnessses, and effectual signs of grace, and God's good will towards us, by the which he doth work invisibly in us, and doth not only quicken, but also strengthen and confirm our Faith in him. There are two Sacraments ordained of Christ our Lord in the Gospel, that is to say, Baptism and the Supper of the Lord.

I do not go into the five "commonly called Sacraments" by the Roman Catholic Church, as it is not necessary for our purpose:—

The Sacraments were not ordained of Christ to be gazed upon, or to be carried about, but that we should duly use them: and in such only as worthily receive the same, they have a wholesome effect or operation: but they that receive them unworthily purchase to themselves damnation, as Saint Paul saith.

It has been suggested that this applies simply to the Sacrament of the Lord's Supper. It seems to me immaterial to consider this question; but I think we must take it as applying to both; that the worthy reception, whatever that may be, must be taken, according to the doctrine of the

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Church, to be equally necessary in respect to Baptism as to the Supper of the Lord ; that "they that receive *them* unworthily" derive no beneficial effect, or saving Grace, but "purchase to themselves damnation, as Saint Paul saith." But the Article leaves it doubtful what a "worthy reception" is. Faith and Repentance, Mr. Gorham says, are necessary, are pre-requisites, to the worthy reception of the Sacrament of Baptism, as well as of the Lord's Supper ; but where does Mr. Gorham find that ? We do not find it laid down in the Article what is a worthy reception ; it must, therefore, be found elsewhere.

The 27th Article, "of Baptism," says :—

Baptism is not only a sign of profession, and mark of difference, whereby Christian men are discerned from others that be not christened, but it is also a sign of Regeneration or new Birth, whereby, as by an instrument, they that receive Baptism rightly are grafted into the Church ; the promises of forgiveness of sin, and of our adoption to be the sons of God by the Holy Ghost, are visibly signed and sealed ; Faith is confirmed, and Grace increased by virtue of prayer unto God.

In this Article, therefore, there is a declaration of the nature of Baptism and of the effects of Baptism ; but it goes on :—

The Baptism of young Children is in anywise to be retained in the Church, as most agreeable with the institution of Christ.

A doubt
 arising.

Now the first difficulty that suggests itself to the mind is, if Faith is to be confirmed and Grace increased by virtue of prayer unto God, how is it that young Children are to be baptized ? They cannot have either Faith or Repentance. They cannot have Faith, because they know not the promises ; and they cannot have repented, as they have committed no actual sin. If Faith and Repentance are necessary to a worthy reception of the Sacrament, the one they have not for want of understanding, and the other is unnecessary, is not required, as there is no actual sin of which they have been guilty.

How to be
 solved.

Taking these two Articles together, therefore, there arises

a doubt, which must be solved by reference to some other authority. What is that authority? Is it to be that of private individuals? I apprehend what I have already said is sufficient to dispose of that question, namely, that the public acts and declarations of the Church must be resorted to for an explanation; that they must say what is meant by "worthy reception," by "Regeneration or new Birth," by the "receiving Baptism rightly," and by the direction that "the Baptism of young Children is in anywise to be retained in the Church, as most agreeable with the institution of Christ." Some means must be provided by the Church, by which young children can be brought within the description of those who are to be "regenerated," to be "grafted into the Church," and to whom "the promises of forgiveness of sin," and of "adoption to be the sons of God by the Holy Ghost," are "visibly signed and sealed." Mr. Gorham suggests that children, being "born in sin," cannot, as such, be "worthy recipients;" it is insisted upon by Mr. Gorham and by his Counsel that "worthy reception" is necessary, in order to produce beneficial effects from the administration of the Sacrament, and that children cannot be worthy recipients, inasmuch as children are "born in sin," and cannot, therefore, unconditionally, receive the rite of Baptism with any beneficial effect. This is apparent from what he says in answer to the question put to him by the Lord Bishop, as to what doctrine our Church and he held with respect to the regeneration of baptized infants. In the 19th question, the Bishop asked whether the Church held, and Mr. Gorham held, that infants, baptized, were regenerated, independently of stipulations made by their representatives; and the answer of Mr. Gorham is, that the Church held, and he held, that, if such infants die before they committed actual sin, they are "undoubtedly saved," upon his hypothesis, that there must have been a prevenient act of grace; and with respect to sponsorship, he had replied, in the answer to the previous question, "so far as the mind of the Church can be ascertained." By a former question he had been asked, whether the Church had not declared her mind that infants baptized received the spiritual grace

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of Baptism, even if they had not entered into stipulations by their representatives. He replied that "the Church has declared that, to infants privately baptized, the grace and mercy of Christ is not denied;" but "in this case of emergency," he considers that stipulations, though not formally made by sponsors, are made by implication. In his answer to the 15th question, "Does our Church hold, and do you hold, that the entering of infants into these stipulations, by their representatives, is necessary to their receiving the spiritual grace of Baptism?" Mr. Gorham answers, "Our Church holds, and I hold, that no spiritual grace is conveyed in Baptism, except to *worthy recipients*; and as infants are by nature *unworthy recipients*, 'being born in sin, and the children of wrath,' they cannot receive any benefit from Baptism, except there shall have been a *prevenient act of grace* to make them worthy." That is the suggestion, that is the hypothesis, of Mr. Gorham,—to which his Counsel says he was driven by the mode in which the question was pressed by the Bishop,—that there must be a *prevenient act of grace*, in order to make children "*worthy recipients*" of Baptism. "Baptism," he adds, "is the sign or seal, either of the grace already given, or of the Repentance and Faith which are stipulated, and must be hereafter exercised." So that Mr. Gorham does not admit that it is by Baptism, or through Baptism, that grace is conferred; but he holds that there must be,—either before, or at, or after Baptism, but there must be,—a *prevenient act of grace*, to render infants "*worthy recipients*," or Baptism is not administered in their case with beneficial effect.

The 18th question, as I said, is to this point :—

Has the Church not declared her mind, that infants baptized by a lawful Minister, in the name of the Father, and of the Son, and of the Holy Ghost, do receive the spiritual grace of Baptism, even if they have not entered into the stipulations by their representatives?

The answer is :—

The Church has declared that, to infants privately baptized, the grace and mercy of Christ is not denied; in this case of emer-

gency, I consider that stipulations, though not *formally* made by sponsors, are made *by implication* through those who earnestly desire their Baptism, and by the person who administers it; which *implied* stipulations the Church requires to be *formally* adopted as soon as the circumstances will suffer it. This case of "present exigence" cannot, therefore, be fairly urged as an exception to the requirements of the Church.

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And he goes on to state the grounds on which he considers the Answer which the Church gives, in the Catechism, to the question,—“why are infants baptized, when, by reason of their tender age, they cannot perform” the promises made by their sureties,—leads to one of three conclusions:—

Either, 1st, the Church intended unworthily to evade the principal difficulty; namely, the case of infants baptized in emergency, without the formal stipulations, the exaction of which is declared in the Answer to solve the difficulty proposed: or, 2ndly, she intended to impose a charitable silence on her members, with regard to so nice and curious a point, shutting up all further search in the promises of God, as generally set forth in Holy Scripture: or, 3rdly, she intended to embrace that case, in her general Answer, and to consider that the stipulations were *implied*, under these urgent circumstances (to be hereafter absolutely entered into if more favourable circumstances permitted), though they were not *formally* given.

The first supposition he dismisses, of course, peremptorily; the second, he observes, would put an end to all further inquiry: “The third conclusion, therefore,” he says, “which I adopt, is the only solution which is *possible*, if I am required to declare my view of the meaning of the Church.”

But the Bishop followed up this question with another, the 19th: “Does the Church hold, and do you hold, that infants, so baptized, are regenerated, independently of the stipulations made by their representatives, or by any others for them?” The answer Mr. Gorham gives is this: “If such infants die before they commit ‘actual sin,’ the Church holds, and I hold, that they are ‘undoubtedly saved.’” That is a direct and precise answer; but Mr. Gorham proceeds: “And, therefore, they must have been regenerated.” That

AUG. 2. is the question, whether they are regenerated or not. He says, not that they are regenerated at Baptism, but that *Gorham v. Bp. of Exeter.* "they must have been regenerated by an act of grace prevenient to their Baptism, in order to make them worthy recipients of that Sacrament. This case is ruled by the Church." Mr. Gorham explains himself thus, in a note: "I mean,—it is ruled that they were actually 'regenerated,' and that they are 'undoubtedly saved.'" "But," he adds, —and here another point is raised,—“if the infant lives to a period in which it can commit 'actual sin,' the declaration of regeneration must be construed according to the hypothetical principle which I have stated in my replies to Questions 5, 6, and 7."

Now in the answers which Mr. Gorham has given to these questions, he admits (for he could not deny, in the face of the declaration of the Church) that infants, baptized, who die before they have committed actual sin, are "undoubtedly saved;" and therefore, he says, "they must have been regenerated," otherwise they would not be "worthy recipients" of the Sacrament, which in unworthy recipients cannot produce any beneficial effects, and he resorts to the hypothesis of a "prevenient act of grace." That there may be such prevenient grace it is not for me to deny; it may be imparted at the time, or it may be granted thereafter. This is a supposition to which Mr. Gorham has resorted, and the Court is not called upon to deny or to affirm it. There may be an act of grace prevenient to the rite, or concurrent with it, or subsequent to it; but Mr. Gorham's position is, that it is not in or through Baptism that grace is conferred.

Authorities
for the doc-
trine of the
Church.

The Court must now look to the authorities upon which it is to rely. The learned Counsel on both sides have examined various Formularies to show what is the doctrine of the Church upon this point; and the first Formulary to which naturally attention must be directed is the Office for "The Ministration of Publick Baptism of Infants." Mr. Gorham's position with respect to this Office is, that this administration of the Sacrament of Baptism is to be considered either as hypothetical, conditional on the fulfilment

of certain promises made for the child by its sponsors; or an act of charitable construction, founded upon a charitable hope on the part of the Church.

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On entering upon this inquiry, the first thing that suggests itself is, that the Exhortation which is given to the parents of children, to bring them to be baptized, denotes the great importance attached to the rite, and to the early administration of it, showing the necessity, or, at all events, inculcating the high importance, of having it performed at the earliest time.

In the Rubric, the Church says :—

The people are to be admonished, that it is most convenient that Baptism should not be administered but upon Sundays, and other Holy-days, when the most number of people come together; as well for that the Congregation there present may testify the receiving of them that be newly baptized into the number of Christ's Church; as also because in the Baptism of Infants every Man present may be put in remembrance of his own profession made to God in his Baptism. For which cause also it is expedient that Baptism be ministered in the vulgar tongue. Nevertheless (if necessity so require) Children may be baptized upon any other day. And note, that there shall be, for every Male child to be baptized, two God-fathers and one God-mother; and for every Female, one God-father and two God-mothers.

In the Office for the Private Baptism of Children, the Curates of every parish are required to admonish the people not to defer the Baptism of their children beyond the first or second Sunday after their birth. This shows, therefore, the necessity of administering the rite at as early a period as may be.

The Office for the Public Baptism of Infants commences with an inquiry by the Minister whether the child had been already baptized or not. Then there is an Exhortation, addressed to those who attend the ceremony, to this effect :—

Dearly beloved, forasmuch as all men are conceived and born in sin; and that our Saviour Christ saith, None can enter into the kingdom of God, except he be regenerate and born anew of Water and of the holy Ghost;—

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Then he exhorts them to pray, and states the terms in which the Congregation shall pray :—

I beseech you to call upon God the Father, through our Lord Jesus Christ, that of his bounteous mercy he will grant to this Child that thing which by nature he cannot have.

The child had been born in sin, and he must be released from sin before he could be received into Christ's Holy Church :—

That he may be baptized with Water and the Holy Ghost, and received into Christ's holy Church, and be made a lively member of the same.

Then follows the Prayer :—

Almighty and everlasting God, who of thy great mercy didst save Noah and his family in the ark from perishing by water; and also didst safely lead the children of Israel thy people through the Red Sea, figuring thereby thy holy Baptism; and by the Baptism of thy well-beloved Son Jesus Christ in the river Jordan, didst sanctify Water to the mystical washing away of sin; We beseech thee, for thine infinite mercies, that thou wilt mercifully look upon this Child; wash him and sanctify him with the holy Ghost; that he, being delivered from thy wrath, may be received into the ark of Christ's Church; and being steadfast in faith, joyful through hope, and rooted in charity, may so pass the waves of this troublesome world, that finally he may come to the land of everlasting life, there to reign with thee world without end; through Jesus Christ our Lord. Amen.

This, therefore, is a prayer on behalf of the child, at that time, that he might be washed and sanctified with the Holy Ghost, "that he, being delivered from God's wrath, may be received into the Ark of Christ's Church." Then follows another Prayer :—

Almighty and immortal God, the aid of all that need, the helper of all that flee to thee for succour, the life of them that believe, and the resurrection of the dead; We call upon thee for this Infant, that he, coming to thy holy Baptism, may receive remission of his sins by spiritual regeneration,—

Not mere baptismal or sacramental regeneration, but it is a prayer that he "may receive remission of his sins by spiritual regeneration,"—

Receive him, O Lord, as thou hast promised by thy well-beloved Son, saying, Ask, and ye shall have; seek, and ye shall find; knock, and it shall be opened unto you: So, give now unto us that ask; let us that seek find; open the gate unto us that knock; that this Infant may enjoy the everlasting benediction of thy heavenly washing, and may come to the eternal kingdom which thou hast promised by Christ our Lord.

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Therefore, what is prayed for is, that the child may receive "remission of his sins by spiritual regeneration;" that is a prayer for spiritual regeneration; not regeneration simply, but spiritual regeneration. Then follows the Gospel, Mark x., v. 13, and then there is an Exhortation upon the words of the Gospel by the Minister, who says:—

Doubt ye not, therefore, but earnestly believe, that he will likewise favourably receive this present Infant; that he will embrace him with the arms of his mercy; that he will give unto him the blessing of eternal life, and make him partaker of his everlasting kingdom.

So they are to have no doubt of this, but earnestly to believe it:—

Wherefore, we being thus persuaded of the good will of our heavenly Father towards this Infant, declared by his Son Jesus Christ; and nothing doubting but that he favourably alloweth this charitable work of ours in bringing this Infant to his holy Baptism; let us faithfully and devoutly give thanks unto him, and say, Almighty and everlasting God, heavenly Father, we give thee humble thanks, for that thou hast vouchsafed to call us to the knowledge of thy grace, and faith in thee: Increase this knowledge, and confirm this faith in us evermore: Give thy holy Spirit to this Infant, that he may be born again, and be made an heir of everlasting salvation.

Then comes an address to the Godfathers and Godmothers, reminding them of what they had prayed for, and which Christ had promised in his Gospel: "Wherefore, after this promise made by Christ, this Infant must also faithfully, for his part, promise by you that are his sureties (until he come of age to take it upon himself), that he will renounce the devil and all his works, and constantly believe God's holy Word, and obediently keep his Commandments;"

Ave. 2. —and then follow the questions to the Godfathers and Godmothers, in the name of the child, and their answers are received. The Minister then pronounces certain prayers, with reference to the answers of the sureties, and this prayer for the sanctification of the water :—

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Almighty, everliving God, whose most dearly-beloved Son Jesus Christ, for the forgiveness of our sins, did shed out of his most precious side both water and blood ; and gave commandment to his disciples, that they should go teach all nations, and baptize them in the Name of the Father, the Son, and the Holy Ghost ; Regard, we beseech thee, the supplications of thy congregation ; sanctify this Water to the mystical washing away of sin ; and grant that this Child, now to be baptized therein, may receive the fullness of thy grace, and ever remain in the number of thy faithful and elect children.

The attention of the Court was directed to the word "mystical ;" "the *mystical* washing away of sin ;" not, it was said, an actual, but a mystical, washing away, implying (as it was afterwards said) that it was a sacramental, not a spiritual, washing away of sin. I do not, I confess, exactly perceive the force of this reasoning. The word "mystical" denotes something beyond that which meets the eye, in the washing away of sin through the sanctification of the water.

All this passes before the child is baptized,—the exhortation to the Congregation and the prayer that the child may be regenerated ; and after the administration of the Sacrament, "in the name of the Father, and of the Son, and of the Holy Ghost," we find that the Church puts into the mouth of the Minister these words : "We receive this Child into the congregation of Christ's flock, and do sign him with the sign of the Cross, in token that hereafter he shall not be ashamed to confess the faith of Christ crucified, and manfully to fight under his banner, against sin, the world, and the devil ; and to continue Christ's faithful soldier and servant unto his life's end." The Minister then says : "Seeing now, dearly beloved brethren, that this Child is regenerate, and grafted into the body of Christ's Church,"—therefore, after the administration of the rite, the child is said to be "regenerate," and to be "grafted into the body

of Christ's Church." After this follows the Lord's Prayer, and then the Minister says: "We yield thee hearty thanks, most merciful Father, that it hath pleased thee to regenerate this Infant with thy holy Spirit, to receive him for thine own Child by adoption, and to incorporate him into thy holy Church;" in other words, that that is granted which we prayed for; we prayed to God that he would regenerate this child with his Holy Spirit, and incorporate him into his Holy Church, and he has been pleased to grant our prayer, and we now return thanks to God for having acceded to the prayer we addressed to him; and it concludes:—

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And humbly we beseech thee to grant, that he, being dead unto sin, and living unto righteousness, and being buried with Christ in his death, may crucify the old man, and utterly abolish the whole body of sin; and that, as he is made partaker of the death of thy Son, he may also be partaker of his resurrection; so that finally, with the residue of thy holy Church, he may be an inheritor of thine everlasting kingdom.

It is said, all this is hypothetical; that it is founded upon the hypothesis, that the child will do everything that is promised for him by his Godfathers and Godmothers,—that he will renounce the world, the flesh, and the devil, and that he will not follow or be led by them. I must confess that this does not appear to me to be the true construction, which seems to me to be this: Here is a positive declaration of the Church, that all this is so—confining ourselves now to Infants, and not referring to adults, because it is admitted on all hands, both by the Bishop and Mr. Gorham, that, in the case of adults, the declarations are all on the hypothesis, that the adults who are baptized are sincere in their professions of faith and repentance; that they intend to perform, and will perform, what they promise and undertake to do. But the declarations of the Church, in the Office for the Public Baptism of Infants, are clear, precise, and positive; there is a prayer for the spiritual regeneration of the child, and there is a declaration that the child "is regenerate," and thanks are given that he has been regenerated by the Holy Spirit. In the concluding instructions to the Godfathers and Godmothers, they are reminded that it is their

Ans. 2. duty to see "that the child be taught, as soon as he shall be able to learn, what a solemn vow, promise, and profession he had there made by them."
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It is suggested that all this is upon a supposition that the child will hereafter perform all that his Godfathers and Godmothers promise for him, and that that is the reason why the Church admits infants to Baptism ; in other words, that the Church proceeds on the assumption that the children will perform these promises themselves in after-life, when they come to years of discretion, and have a capacity to know and understand what has been promised in their names, and the principles of religion and the doctrines of that Church into which they have been grafted; that the hypothesis, the charitable hope, of the Church, is, that they will perform the engagements made for them by their sureties at their Baptism. It was contended, that the Office for the Private Baptism of Infants being intended for cases of exigence, when Godfathers and Godmothers are not required to be present, these are cases of emergency and exigency, and therefore nothing in respect to the efficacy of unconditional Baptism is to be drawn from this Formulary. I confess, I differ in opinion from the learned Counsel. If it be a case of exigency, is it not a case in which the Church intends to declare that the child so baptized is entitled to all the benefits to which an infant in full health, baptized with the full service, would be entitled upon his Baptism ? Otherwise, why does the Church declare this ? The Church directs that "so many of the Collects appointed to be said before in the Form of Public Baptism, as the time and present exigence will suffer," shall be made use of; after this, the Minister baptizes the child "in the name of the Father, and of the Son, and of the Holy Ghost," and then he is to give thanks and say : "We yield thee hearty thanks, most merciful Father, that it hath pleased thee to regenerate this Infant with thy holy Spirit, to receive him for thine own Child by adoption, and to incorporate him into thy holy Church." Here is, therefore, the full effect of Baptism given to the child so baptized without the intervention of Godfathers and Godmothers ; thanks are given that the

child is "regenerated with the Holy Spirit," received as the child of God by adoption, and incorporated with the Holy Church, as in the case of public Baptism; so that there can be no doubt that the full effect of Baptism is considered to be given, though it may not be absolutely prayed for, otherwise the Church would not go on to declare: "Let them not doubt but that the child so baptized is lawfully and sufficiently baptized, and ought not to be baptized again." The administration of the Sacrament was complete when the child had been baptized with water, "in the name of the Father, and of the Son, and of the Holy Ghost." I think there is something in what was said by the learned Counsel for the Bishop of Exeter, that, if this were not so, surely the child ought to be baptized again, for it would not have received the full benefit of the Sacrament; that if it recovered, and this was not a sufficient Baptism, the child ought to be brought to the Church and be baptized again. But what is done afterwards has nothing to do with re-baptism. The child, it is declared, is sufficiently baptized, and ought not to be baptized again.

But it is said that the Church is anxious to put the public and private Baptism of infants on the same footing, and that the direction of the Rubric is, that, if the child lives, it should be brought to the Church: "Nevertheless, if the Child, which is after this sort baptized, do afterward live, it is expedient that it be brought into the Church, to the intent that, if the Minister of the same Parish did himself baptize that Child, the Congregation may be certified of the true Form of Baptism, by him privately before used;" and the Minister certifies that, "according to the due and prescribed Order of the Church, at such a time and at such a place, before divers witnesses, I baptized this Child." But if the child was baptized by any other lawful Minister, then the Minister of the parish examines those who bring the child, whether it was lawfully baptized, inquiring by whom the child was baptized, who was present; and "because some things essential to this Sacrament may happen to be omitted through fear or haste," he asks with what matter and with what words the child was baptized: so that the matter and

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Gorham v. the Minister shall find, by the answers of such as bring the
Bp. of Exeter. Child, that all things were done as they ought to be; then shall not he christen the Child again, but shall receive him as one of the flock of true Christian people;" showing that the essential parts of Baptism are the water and the words: and the certificate—which is not the certificate of the Minister, but of the Church—is in these words:—

I certify you, that in this case all is well done, and according unto due order, concerning the baptizing of this Child; who being born in original sin, and in the wrath of God, is now, by the laver of Regeneration in Baptism, received into the number of the children of God, and heirs of everlasting life.

Here is a declaration, positive and precise,—no reference to Godfathers and Godmothers, but a positive declaration,—that the child so baptized "in the name of the Father, and of the Son, and of the Holy Ghost," having been born in original sin, is now, "by the laver of Regeneration in Baptism, received into the number of the children of God, and heirs of everlasting life." I say, this form of private Baptism of infants, therefore, shows that what is required besides in the other is matter of order, decency, and submission to the will of God, and of earnest prayer; but is not an essential part of Baptism; that Godfathers and Godmothers are not an essential part of Baptism; that the Water and the Words are the essential, and the only essential, parts of Baptism.

It is said that all this is conditional; that both Offices are founded upon an hypothesis; but what room is there for this argument? True it is, if a child so baptized live and fall thereafter into actual sin; if he attain an age when he is capable of understanding the promises of God and of repenting, and do not repent of actual sin, he may lose the benefits of Baptism; having been washed from sin, he may commit other actual sin, and fall into a state of wickedness, and require faith and repentance, not in order to regenerate him, for that had been already done in Baptism, according to the declaration of the Church, but that he may thereby be renewed and brought back. But to put the matter beyond all doubt,

there is a positive declaration of the Church,—not a mere hypothetical opinion, not the charitable hope or charitable judgment of the Church, but an express declaration,—that “it is certain, by God’s Word, that Children which are baptized, dying before they commit actual sin, are undoubtedly saved.” Is not this a positive declaration of the Church? According to her interpretation of God’s Word, the Church declares it is certain that children, who are baptized, dying before they commit actual sin, “are undoubtedly saved;” and Mr. Gorham himself admits that the Church has ruled this. I cannot understand how anything like a charitable hope can be engrafted upon these words, that “it is *certain*,” by God’s Word, that such children are “*undoubtedly* saved;” the certainty is based upon the Word of God. I cannot see how the Church can have expressed only a charitable hope, when it declares that the children are “regenerated with the Holy Spirit;” how the positive declaration, that they are received and regenerated and grafted and incorporated into God’s Holy Church, can be regarded as hypothetical, or expressing merely a charitable hope on the part of the Church, it is extremely difficult to conceive: it is a positive declaration of what the Church considers to be the true interpretation of the Holy Scriptures.

But there is another Formulary of service, for the Baptism of adults, and that, it is said, is put on precisely the same footing as the other Formularies, and in this the language is confessedly hypothetical and conditional. This Formulary was not originally a part of the Offices of Baptism, but was added on account of the growth of Anabaptism, and for natives in the Plantations, and converts. It is said that all were put upon the same footing; the argument is, if one Form out of three be confessedly hypothetical, why should not the others be considered and construed as hypothetical? It appears to me that there is this marked distinction between them. In the case of persons of riper years, they are persons who have not only committed actual sin, and have therefore need of repentance, but the Rubric requires that they should be previously “instructed in the principles of the Christian religion,” and

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that they should be exhorted to prepare themselves with prayer and fasting before they can be permitted to partake of this Holy Sacrament. A person of riper years comes in his own right, with a full knowledge of what he is to do, and makes the promises in his own person; and in his case, the declaration is founded on the hypothesis or supposition that it is his sincere intention to perform what he engages to do. Here is a marked distinction. Infants engage by their sureties, and if they die before they commit actual sin, they are saved; but persons of riper years, instructed in the principles of the Christian religion, know what they have promised and what they must perform, and they are entitled to the benefits of Baptism only on the supposition that they are sincere in their promises of faith and repentance. If such persons offer themselves for the Baptismal rite, they must do it either hypocritically or sincerely, and the Church cannot know, except from their outward professions, whether they be sincere or not. There is a marked distinction, therefore, between the case of infants, who cannot have committed actual sin, and that of adults, respecting whom the Church can only rely upon their outward marks of faith and repentance. So that, as it appears to me, no argument is to be drawn from the hypothetical sense or charitable judgment of the Church in the case of adults, to the case of infants; in the one case, they must be sincere in their intentions to fulfil their engagements; in the other, there is a positive declaration that infants are saved if they are baptized and die before they commit actual sin. The Church bases herself upon the sense she puts upon the Word of God, by which (as the Church pronounces positively) children are by Baptism in a state of Salvation. There are but two conditions,—being baptized, and dying before the commission of actual sin,—to entitle an infant to the benefit from Baptism which the Church declares to be “certain” by God’s Word. No argument, therefore, can be drawn from the hypothetical sense employed in one service to the construction of others. The Church can only act on the charitable supposition, in the case of adults, that they are sincere, and the Bishop has

never contended that such persons, who do not come sincerely with the intention of forsaking sin, and performing the promises made by them, can receive benefit from this Sacrament. So that the services are most materially distinguished from each other, not merely in this particular, that the one is for adults and the others for infants, but because there is an essential and substantial difference between them, and because they rest upon separate and distinct grounds.

What is the next thing to be done? When a child has been baptized, and has arrived at an age when it can learn the principles of religion, it is to be instructed—in what? “In the Church Catechism set forth for that purpose.” In that Catechism, what are the first questions? “What is your name?” and “Who gave you that name?” The answer is, “My Godfathers and Godmothers, in my Baptism; wherein I was made a member of Christ, the child of God, and an inheritor of the kingdom of heaven.” This is in entire conformity with the terms used by the Church at the time of Baptism, in which, he says, he was made a “member of Christ, a child of God, and an inheritor of the kingdom of heaven.” The next question is: “What did your Godfathers and Godmothers then for you?” The answer is: “They did promise and vow three things in my name: First, that I should renounce the devil and all his works, the pomps and vanity of this wicked world, and all the sinful lusts of the flesh.” This agrees with the renunciation in the Baptismal Service. “Secondly, that I should believe all the Articles of the Christian Faith: and, thirdly, that I should keep God’s holy will and commandments, and walk in the same all the days of my life.” The next question is, “Dost thou not think that thou art bound to believe, and to do, as they have promised for thee?” Answer: “Yes, verily; and, by God’s help, so I will: and I heartily thank our heavenly Father, that he hath called me to this state of salvation, through Jesus Christ our Saviour,”—that is, the state in which I was placed by my Baptism. I am not what I was; I am no longer a child of wrath, but a child of grace; I was born in sin, and am now free from sin; “and I pray unto God to give me his grace, that I may continue

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Ans. 2. in the same unto my life's end,"—he prays that he may "continue" therein to his life's end. There is nothing hypothetical in these words. The child, being without actual sin, was called to a state of salvation, and he prays for grace that he may not fall away, and may not lose the benefit of his Baptism and the grace conferred upon him thereby. The child is then required to rehearse the Articles of his Belief, and repeat the Commandments and the Lord's Prayer; and is then asked these questions, which were added at the time of the Restoration: "How many Sacraments hath Christ ordained in his Church?" Answer: "Two only, as generally necessary to salvation; that is to say, Baptism, and the Supper of the Lord." Question: "What meanest thou by this word *Sacrament*?" Answer: "I mean an outward and visible sign of an inward and spiritual grace given unto us, ordained by Christ himself, as a means whereby we receive the same, and a pledge to assure us thereof." Here again is the same language as in the Service itself; it is "an outward and visible sign of an inward and spiritual grace;" it was "ordained by Christ himself, as a means whereby we receive the same,"—that is, the spiritual grace,— "and a pledge to assure us thereof,"—that is, that we have received the same. I cannot understand how any doubt can remain as to what is conferred by the Sacrament of Baptism, after reading these words.

The next question is, "How many parts are there in a Sacrament?" Answer: "Two; the outward visible sign, and the inward spiritual grace." Question: "What is the outward visible sign or form in Baptism?" Answer: "Water; wherein the person is baptized *In the name of the Father, and of the Son, and of the Holy Ghost.*" Question: "What is the inward and spiritual grace?" Answer: "A death unto sin, and a new birth unto righteousness; for, being by nature born in sin, and the children of wrath, we are hereby made the children of grace,"—that is, the child, born in sin, is, by regeneration by the Holy Spirit in Baptism, made a child of grace. Then comes this question: "What is required of persons to be baptized?" Answer: "Repentance, whereby they forsake sin; and Faith, whereby

they stedfastly believe the promises of God made to them in that Sacrament." Question: "Why then are Infants baptized, when by reason of their tender age they cannot perform them?" Answer: "Because they promise them both by their Sureties; which promise, when they come to age, themselves are bound to perform." Children, therefore, are admitted by the Church to the Sacrament of Baptism on a supposition that, if they do come to years of discretion, they will take upon themselves the performance of that vow which had been made for them by their Sureties at Baptism. But what is the state of those children who die before? Precisely that which is declared by the Church at the end of the Baptismal Service: "It is certain by God's Word, that children which are baptized, dying before they commit actual sin, are undoubtedly saved." They must have been baptized, and they must die without having committed actual sin, to come within this condition.

It appears to me that all the passages I have read are in direct conformity with what has been laid down as the doctrine of the Church, which says nothing about "prevenient grace." The Church says that, if the child lives to an age when it may commit actual sin, it is bound to perform those promises of Repentance and Faith made in its name, and the child is received by anticipation.

And this is the doctrine which runs through all the Catechisms that have been referred to in the course of the Argument. I do not apprehend that any Catechism will be found which places it upon any other footing whatever. In Dean Nowell's* (which I take from Bishop Randolph's *Enchiridion Theologicum*) it is thus stated:—

M. De Baptismo ergo primum dic quid censeas.

A. Quum naturâ filii iræ, id est, alieni ab Ecclesiâ, quæ Dei familia est, simus, Baptismus veluti aditus quidam nobis est, per quem in eam admittimur: unde et testimonium etiam amplissimum accipimus, in numero domesticorum, adeoque filiorum Dei, nos jam esse: imo in Christi corpus quasi cooptari, atque inseri, ejusque membra fieri, et in unum cum ipso corpus coalescere.

* Catechismus, sive Prima Institutio Disciplinæ Pietatis Christianæ: *Enchiridion*, 2 vol. p. 212.

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M. Sacramentum antea dicebas duabus constare partibus, signo externo, et arcana gratia. Quod est in Baptismo signum externum?

A. Aqua, in quam baptizatus intingitur, vel ea aspergitur, in nomine Patris, et Filii, et Spiritus Sancti.

M. Quæ est arcana et spiritualis gratia?

A. Ea duplex est: Remissio videlicet peccatorum, et Regeneratio, quæ utraque in externo illo signo solidam et expressam effigiem suam tenent.

M. Quomodo?

A. Primum, quemadmodum sordes corporis aqua, ita animæ maculæ per remissionem peccatorum eluuntur: deinde Regenerationis initium, id est, naturæ nostræ mortificatio, vel immersio in aquam, vel ejus aspersione exprimitur. Postremo vero, quum ab aqua, quam ad momentum subimus, statim emergimus, nova vita, quæ est Regenerationis nostræ pars altera, atque finis, representatur.

In accordance with all our Baptismal Services and the Catechism of the Church.

M. Videris aquam effigiem tantum quandam rerum Divinarum efficere.

A. Effigies quidem est, sed minime inanis, aut fallax; ut cui rerum ipsarum veritas adjuncta sit atque annexa. Nam sicuti Deus peccatorum condonationem, et vitæ novitatem, nobis vere in Baptismo offert, ita a nobis certo recipiuntur: Absit enim ut Deum vanis nos imaginibus ludere atque frustrari putemus.

M. Non ergo remissionem peccatorum externa aquæ lavatione aut aspersione consequimur?

A. Minime: Nam solus Christus sanguine suo animarum nostrarum maculas luit atque eluit. Hunc ergo honorem externo elemento tribuere nefas est. Verum Spiritus Sanctus conscientias nostras sacro illo sanguine quasi aspergens, abstersis omnibus peccati sordibus, puros nos coram Deo reddit. Hujus vero peccatorum nostrorum expiationis ob signationem atque pignus in Sacramento habemus.

M. Regenerationem vero unde habemus?

A. Non aliunde quam a morte et resurrectione Christi; nam per mortis suæ vim vetus homo noster quodammodo crucifigitur et mortificatur, et naturæ nostræ vitiositas quasi sepelitur, ne amplius in nobis vivat et vigeat. Resurrectionis vero suæ beneficio nobis largitur, ut in novam vitam ad obediendum Dei justitiæ reformemur.

M. An gratiam hanc omnes communiter et promiscue consequuntur?

A. Soli fideles hunc fructum percipiunt; increduli vero oblatas illic a Deo promissiones respuendo, aditum sibi præcludentes, inanes abeunt, non tamen ideo efficiunt, ut suam Sacramenta vim et naturam amittant.

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So that those persons only who receive the beneficial effect of Baptism are the faithful; but the unfaithful, the "*increduli, oblatas illic a Deo promissiones respuendo, aditum sibi præcludentes, inanes abeunt*:" they receive no benefit or advantage from it; as in our Office for adult Baptism, it was in a mere hypothetical sense; those who are not sincere in their Faith and Repentance receive no benefit from the administration of the Sacrament.

M. Rectus ergo Baptismi usus quibus in rebus sit situs, breviter edissere.

A. In Fide et Pœnitentia.

This is the doctrine of our Church: "Repentance, whereby we forsake sin; and Faith, whereby we stedfastly believe the promises of God made to us in that Sacrament."

Primum enim Christi nos sanguine a cunctis purgatos sordibus Deo gratos esse, Spiritumque ejus in nobis habitare certa fiducia cum animis nostris statutum habere oportet. Deinde in carne nostra mortificanda, obediendoque justitiæ Divinæ, assidue omni ope et opera est enitendum, et pia vita apud omnes declarandum nos in Baptismo Christum ipsum quasi induisse, et ejus Spiritu donatos esse.

Then comes the question as to the reason why infants are admitted to the Sacrament; and, as it appears to me, it is almost in the very words of our Catechism, "because they promise them both,"—Repentance and Faith,—"by their sureties; which promise, when they come to age, themselves are bound to perform."

M. Quum infantes hæc, quæ commemoras, hactenus per ætatem præstare non possint, qui fit ut illi baptizentur?

A. Ut Fides et Pœnitentia Baptismo præcedant, tantum in adultis, qui per ætatem sunt utriusque capaces, exigitur; infan-

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tibus vero promissio Ecclesiæ facta per Christum, in cujus Fide baptizantur, in præsens satis erit; deinde postquam adoleverint, Baptismi sui veritatem ipsos agnoscere, ejusque vim in animis eorum vigere, atque ipsorum vita et moribus repræsentari omnino oportet.

These are almost the words of our own Catechism, and the learned Counsel for the Bishop of Exeter was rather taunted with not citing them; they show that that Catechism is on the same footing as that of our own Church, namely, that Faith and Repentance must precede Baptism, in the case of adults, and that, in the case of infants, the promises made on their behalf are accepted; but they must not be forgetful of their Baptism, and when they come of age, they must acknowledge the truth of their Baptism, "*ejusque vim in animis eorum vigere, atque ipsorum vita et moribus repræsentari omnino oportet*:" they must not, when they come of age, forget what had been promised in their behalf. So that I see no substantial difference between the doctrine of our Church Catechism and that of Dean Nowell's Catechism.

Then the child, having come to years of discretion, and been instructed in the principles of religion, is brought to be confirmed by the Bishop, that he may take upon himself the promises made on his behalf by his Godfathers and Godmothers, in order that he may be prepared to be made a partaker of the Sacrament of the Supper of our Lord. We are told, in the Exhortation, the reason why the Order of Confirmation is framed as it is, namely, "to the end that children, being now come to the years of discretion, and having learned what their Godfathers and Godmothers promised for them in Baptism, they may themselves, with their own mouth and consent, openly before the Church, ratify and confirm the same; and also promise, that by the grace of God they will evermore endeavour themselves faithfully to observe such things as they, by their own confession, have assented unto." And then a question is put to the children,—whether they renewed the solemn promise and vow made in their names at their Baptism, ratifying and confirming the same? Then what is the Prayer offered by

the Bishop? "Almighty and everliving God, who hast vouchsafed to regenerate these thy servants by Water and the Holy Ghost, and hast given unto them forgiveness of all their sins." Here, then, is a declaration that the children are "regenerated by Water and the Holy Ghost," and that their sins are forgiven; directly in harmony with and following up what the Church had said before in the Baptismal Service and in the Catechism. All is done by Baptism; through Baptism there is regeneration by Water and by the Holy Ghost, and the forgiveness of sins.

These are Services on which great stress was laid by the learned Counsel for Mr. Gorham, and in which it appears to me that the whole doctrine of the Church is not hypothetical; that it is not the expression of a charitable hope, but a positive declaration that the things are so.

It appears to me, therefore, that the fact of the doctrine of regeneration in the Baptism of infants (supposing the words are to be taken in their natural and literal sense) is made out and established. But a difficulty arises, to ascertain what is meant by the term "regeneration." Does it really imply an absolute change of the nature, and character, and feelings, and opinions? or does it imply a change of state and relations,—a change from a child of wrath to a child of grace, giving new privileges and realizing the promises made? It appears to me that this is sufficiently explained by the terms made use of,—by the words added to the term "regeneration," namely, "regeneration by Water and the Holy Ghost." Remission of sins is given by means of the administration of Water, and of the Holy Ghost accompanying it; and it is nothing to say that the sign may be received without the spiritual Grace. This may be so in the case of adults, and is so very often, and indeed must be so, and the Church can only in their case express a charitable hope that it is not so, and that the parties are sincere in their promises of Faith and Repentance; and if they are so, the Church declares that they are received and made members of Christ's Church, "born again and made heirs of everlasting Salvation," and they thus receive the benefits of Baptism. The charitable hope of the Church is, that they are

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sincere, and, if sincere, they are regenerate by the Holy Ghost and by Water.

The difficulty may be removed by considering what is the meaning of the term "regeneration" in the sense of the Church, as expressed in these Services, and what is the meaning attached to it by those who advocate Calvinistic principles; and it seems to me, from a reference to the primitive Church, that "regeneration" does not mean such a total change of character as would amount almost to justification, from which state the person so regenerated could never finally fall; but that "regeneration" means a change of state, and character, and relation, and the putting the person into an entirely new situation, converted from a child of wrath to a child of grace, and made "a member of Christ, the child of God, and an inheritor of the kingdom of heaven."

I find this laid down by a living dignitary of the Church, Dr. Bethell, Bishop of Bangor :*—

No reasonable doubt can be entertained that the term "Regeneration" was appropriated to that grace, whatever may be its nature, which is bestowed on us in the Sacrament of Baptism (including perhaps occasionally, by a common figure of speech, its proper and legitimate effects, considered in conjunction with it), from the beginning of Christianity to no very distant era of Ecclesiastical History. In those few passages of the ancient Christian writers where it bears another signification, it is used apparently in a figurative manner, to express such a change as seemed to bear some analogy in magnitude and importance to the change effected in Baptism. At the time of the Reformation, the word was commonly used in a more loose and popular way, to signify sometimes justification, sometimes conversion, or the turning from sinful courses, sometimes repentance, or that gradual change of heart and life, which is likewise styled renovation. Hence, in popular language, it came to signify a great and general reformation of habits and character, and the words "regenerate" and "unregenerate" were substituted for the words "converted" and "unconverted," "renewed" and "unrenewed," "righteous" and "wicked."

* A General View of the Doctrine of Regeneration in Baptism (4th Ed. Lond. 1845), p. 6.

In modern times we have been told that regeneration is quite unconnected with Baptism ; that regeneration may indeed take place in that Sacrament as well as at any other time ; " but to suppose it to be in any proper sense dependent upon it, is an unreasonable and unscriptural opinion." Reference has been made to Dr. Waterland, and he says,* Regeneration is another word for the new birth of a Christian, which means " a spiritual change wrought upon any person by the Holy Spirit in the use of Baptism." He draws a distinction between Regeneration and Renovation, which he understands as a renewal of heart and mind. " Indeed, Regeneration is itself a kind of renewal ; but then it is of the spiritual state, considered at large ; whereas Renovation seems to mean a more particular kind of renewal, namely, of the inward frame or disposition of the man, which is rather a capacity or qualification (in adults) for salutary Regeneration than the Regeneration itself. Regeneration may be granted and received (as in infants) where that Renovation has no place at all, for the time being." Regeneration and Renovation, he says, differ in respect to the effective cause or agency : " one is the work of the Spirit in the use of Water ; that is, of the Spirit singly, since Water really does nothing, is no agent at all ; the other is the work of the Spirit and the man together." He says, " Regeneration ordinarily is in or through Baptism, only a transient thing, which comes but once ; whereas Renovation is before, and in, and after Baptism, and may be often repeated ; but in infants Regeneration commences before Renovation. Adults coming to Baptism fully prepared by Faith and Repentance, he says, were to be admitted to Baptism in order to be effectually " born of Water and of the Spirit," Faith and Repentance alone not being supposed ordinarily to make them regenerate without Baptism. In the case of infants, he says, " their innocence and incapacity are to them instead of Repentance, which they do not need, and of actual Faith, which they cannot have :

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* Regeneration Stated and Explained : Works (Oxf. 1823), 6 vol. p. 352.

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they are capable of being savingly born of Water and the Spirit, and being adopted into sonship. These are the opinions of Dr. Waterland, and the interpretations he gives of the doctrine, and this is the distinction he draws between the Baptism of adults and that of infants; that grown persons must have Faith and Repentance to make them regenerate; whereas infants may be savingly born of Water and the Spirit, "which translates them out of their state of nature to a state of grace, favour, and blessing; this is their Regeneration."

But there is another high authority to whom I wish to refer on this question, as to the term "regeneration;" I mean Bishop Van Mildert, in his *Bampton Lectures* :*—

Regeneration, in the Scriptural usage of it, means only our initiation or entrance by Baptism into that covenant which gives us new privileges, new hopes, and a new principle of spiritual life; placing us in a totally different state from that to which by nature only we could ever attain. The expression therefore cannot, without a direct violation of the verbal analogy of Scripture, be applied to any operation that takes place subsequent to that baptismal change, with which alone it perfectly corresponds.

This is the view taken by Bishop Van Mildert with respect to regeneration; that we have thereby new privileges and new hopes; that it places us in a new state, totally different from that of nature: in conformity with the expressions in the Baptismal Service, "Grant to this child that thing which by nature he cannot have." This is the sense given to the term "regeneration,"—a change of state,—to a state of grace from a state of wrath.

So that it appears to me from the Services of the Church, that children (infants), who receive the Sacrament of Baptism, receive the grace of regeneration in Baptism, and are thereby placed in a state in which they may be made "partakers of the kingdom of heaven;" in this case the child is made "the child of God." They may, however, lose this benefit; they may fall away and commit actual sin, and if they grow up and continue therein, and die without repentance,

* 6 vol. (Lond. 1815) p. 109.

in that case the grace given by Baptism will be lost. But in the case of infants who die after Baptism, before the commission of actual sin, they are "regenerate" and are "undoubtedly saved." On this part of the case, the Court can entertain no doubt; the words of the Services themselves are that they are regenerated, in and through the means of Baptism; this is the distinct and positive language of the Church.

This being so, what is the next question to be considered by the Court? Reference has been made to the Burial Service; that is said to be a service founded on hope,—on the hypothesis that the deceased was prepared for death; that God had, of his great mercy, "taken to himself" the person deceased, whose body was, therefore, committed to the earth "in sure and certain hope of the resurrection to eternal life." I confess it does not appear to me that any great strength of argument can be drawn by analogy from the Office for the Burial of the Dead. The Church must necessarily assume that God had taken the departed "to himself,"—meaning, I presume, removed him from the miseries of this world of sin,—whether in a state of repentance or not,—for of this the Church cannot judge,—but removed him from the possibility of committing further actual sin; and the latter part of the service expresses a hope—"as our hope is this our brother doth,"—that is, rest in Christ: this proceeds upon the hypothesis that the party deceased may have repented of his sins. The Church cannot say whether or not he was a repentant sinner; whether he is to be eventually received into the kingdom of heaven, or whether he is to suffer the punishment of his sins and transgressions; but her hope is that "this our brother doth" rest in Christ. Therefore, I think, there is nothing in the argument deduced from the hypothetical sense in which this Service is expressed.

But then it is said that the Articles are not to be construed by the Formularies; for it is argued that, when a clergyman is called upon, in compliance with the Act of Uniformity, 13 and 14 Car. 2, c. 4, besides subscribing the Articles, to express his "unfeigned assent and consent to

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the use of all things contained and prescribed in the Book of Common Prayer," it is only to its use, and that the Book contains nothing contrary to the Word of God. I cannot think there is anything in that. It is said the consent is to its use, not to all its doctrines; but I think, if a person expresses his assent and consent to the use of the Book; if he consents and assents to use it, and if he assents and consents that it contains nothing contrary to the Word of God, he acknowledges the truth of whatever is there; he cannot say, "I acknowledge the use of it; I assent and consent merely to use it." The words of the declaration, "I declare my unfeigned assent and consent to the use of all things contained and prescribed in the Book of Common Prayer," appear to me to imply a belief in all that is contained therein. The Articles are subscribed to as agreeable to the Word of God, and the Book of Common Prayer is declared to contain nothing contrary to the Word of God; it seems to me, therefore, that both must be in unison, and that the Book of Common Prayer can contain nothing that is to be construed in opposition to the Articles.

But then this question arises, and a very important question it is,—What were the opinions of the Reformers? and the learned Counsel occupied some time in the course of the Argument to show that the Reformers themselves were Calvinists; that they had embraced Calvinistic principles, and maintained the opinions of Calvin, and therefore could not have intended to declare, in such positive terms as the Baptismal and other Services of the Church impart, that infants are unconditionally regenerated in and by Baptism. In the first instance, some advantage was taken of a declaration made by Dr. Addams, that Cranmer had never changed his opinions with regard to Baptism, which had been always the same, and I think the learned Counsel (Dr. Bayford) argued very successfully against this position, by showing that Cranmer did change and must have changed his opinions; but I think Dr. Addams did not mean to maintain that position in its utmost latitude. Having been brought up a Roman Catholic, and having continued so for a great part of his life, Cranmer would have favoured the *opus operatum*

of the Romish Church: so that, in the latter part of his life, he must have changed his opinions and views in this respect, and undoubtedly he did change them. Whether the Reformers embraced the whole doctrines of Calvin or not, is a matter of grave dispute. It cannot be denied that the doctrines of Calvin made a certain progress in this country at the time of the early Reformers. At that period, Cranmer, Ridley, Latimer, and other Reformers, to a certain extent, embraced the principles of Calvin. But to what extent? Did they embrace the whole of his opinions? Did they go to the extent of Predestination, and Election, and Final Perseverance, and Reprobation? Because all these were doctrines of Calvin. If it be said that the opinions and principles of Cranmer are to be judged of by those of the persons with whom he associated in the work of Reformation, then they were the same as those of Calvin, and Martin Bucer, and Peter Martyr, the two latter having been placed by his influence in chairs at Oxford and Cambridge. It has been argued that Martin Bucer and Peter Martyr, being friends and intimates of Cranmer, were invited by him to this country to assist and did assist him in the work of Reformation. But how far did they act upon the principles of Calvin? The learned Counsel for Mr. Gorham said that, in his opinion, the 17th Article determined this question. That Article relates to Predestination and Election. It recites that—

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Predestination to Life is the everlasting purpose of God, whereby (before the foundations of the world were laid) he hath constantly decreed by his counsel, secret to us, to deliver from curse and damnation those whom he hath chosen in Christ out of mankind, and to bring them by Christ to everlasting salvation, as vessels made to honour. Wherefore they which be endued with so excellent a benefit of God be called according to God's purpose by his Spirit working in due season: they through Grace obey the calling: they be justified freely: they be made sons of God by adoption: they be made like the image of his only-begotten Son Jesus Christ: they walk religiously in good works, and at length, by God's mercy, they attain to everlasting felicity. As the godly consideration of Predestination, and our Election in

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Christ, is full of sweet, pleasant, and unspeakable comfort to godly persons, and such as feel in themselves the working of the Spirit of Christ, mortifying the works of the flesh, and their earthly members, and drawing up their mind to high and heavenly things, as well because it doth greatly establish and confirm their faith of Eternal Salvation to be enjoyed through Christ, as because it doth fervently kindle their love towards God.

It might have been supposed that the Reformers would have gone on to declare that this was the opinion and doctrine of the Church ; but, so far from this, they go on to say :—

So, for curious and carnal persons, lacking the Spirit of Christ, to have continually before their eyes the sentence of God's Predestination, is a most dangerous downfall, whereby the Devil doth thrust them either into desperation, or into wretchlessness of most unclean living, no less perilous than desperation. Furthermore, we must receive God's promises in such wise, as they be generally set forth to us in holy Scripture ; and, in our doings, that Will of God is to be followed, which we have expressly declared unto us in the Word of God.

So that in the end they determine nothing as to the doctrine of Predestination and Election ; they speak of it as " full of sweet, pleasant, and unspeakable comfort to godly persons ;" but " for curious and carnal persons," it is declared to be " a most dangerous downfall, whereby the Devil doth thrust them either into desperation, or into wretchlessness of most unclean living, no less perilous than desperation." It is admitted that the question is here left open ; that the Reformers declare nothing ; they do not impose this as an Article of faith ; and it is contended that it was so left open for the very purpose of letting in as many as possible to come in and subscribe the Articles. But I cannot think that the inducement to leave this an open question was, that the doctrine might be believed or not. I think, if the Reformers did entertain the doctrine of Predestination and Election, they would have expressed themselves in terms which would have left no doubt as to their meaning,—they could not have been in want of terms to express their meaning,—and they would not have been guilty of

leading parties into a belief that this was a dogma of faith which they had not distinctly declared to be so.

I ask again, to what extent were the doctrines of Calvin embraced by the Reformers? Were they believed to the extent to which Bishop Hopkins believed them, who says* that "God promises pardon and remission of sins to all that believe and repent; but he promises grace to believe and repent only to those whom, by his absolute covenant, he has engaged to bring through Faith and Repentance to Salvation?" Did Ridley, Latimer, and Cranmer go to this extent? Or did they go to the same extent as the Synod of Dort? In the 6th Article of the Synod of Dort it is said:† "*Secundum quod decretum, electorum corda, quantumvis dura, gratiose emollit, et ad credendum inflectit; non-electos autem justo judicio suæ malitiæ et duritiæ relinquit:*" that is to say, "the hearts of the elect, however hard, He softens, and turns to the faith; but those who are not among the number of the elect He leaves to their own wickedness and obduracy." Was that the doctrine of Latimer, or Ridley, or Cranmer? Again, what does the 7th Article of the Synod of Dort say? "*Est autem electio immutabile Dei propositum, quo ante jacta mundi fundamenta, e universo genere humano, ex primævi integritate in peccatum et exitium suæ culpæ prolapsa, secundum liberrimum voluntatis suæ beneplacitum, ex meriti gratiâ, certam quorundam hominum multitudinem, aliis nec meliorum, nec digniorum, sed in communi*

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* Sermon X.; Works (Lond. 1701), p. 506. [The passage referred to is as follows: "The conditional covenant of Grace promises pardon and remission of sins unto all that shall believe and repent. But notwithstanding all this, the whole world might perish under a contracted impotency, whereby they could not believe nor repent, did not the absolute covenant engage God's truth to work Faith and Repentance in the hearts of his people: so that one covenant promiseth pardon if we believe and repent, and the other covenant bestows this Faith and Repentance upon us. The conditional covenant promiseth pardon of sin and salvation if we believe and repent, and the absolute covenant promiseth Faith and Repentance to us to enable us to believe and repent."]

† Acta Synodi Nationalis Dordrechtanæ (Dord. 1620), c. 1, "De Divinâ Prædestinatione."

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misericord cum aliis jacentium, ad salutem elegit in Christo."

Was this the doctrine held by the Reformers? It is the doctrine of Calvin, as set forth in his Institutes; but did our Reformers go to that extent? The opinions of the Continental Reformers can be collected from what they say; but our Reformers have not explained their opinions in terms so as to leave no doubt as to what they were. Is it possible that these could be the doctrines of Crammer, and Latimer, and Ridley, living in the time of Edward 6, who have expressed themselves as they have done in the terms of our Formularies, that infants may be baptized, and when baptized are regenerated, and if they die after Baptism before they commit actual sin, they are undoubtedly saved, and this as certain according to God's word? Could they say this, holding that none but the Elect are to have the power of Faith and Repentance granted to them, in opposition to doctrines declared in such positive and direct terms? It has been said that Mr. Gorham does not come within this description of persons; that he does not say that this applies only to some children,—to children that are elect and not to all children; that this is not his doctrine. Mr. Gorham says that the Church has determined that children who are baptized and who die without committing actual sin are undoubtedly saved; but then Mr. Gorham will not allow that it is by Baptism; he says it is by "prevenient grace," whereby they are made worthy recipients, and without which, not being "worthy recipients," they could not be saved. But in order to justify this position, the learned Counsel for Mr. Gorham maintains that the Reformers were Calvinists, and that therefore their declarations in the Services of the Church must be taken in a Calvinistic sense; that you must not give the words their general meaning, but take them with this reservation, considering that they were applied "to those only who are of the Elect." Why I say this is not only in opposition to the Baptismal Service, but to all forms of prayer; it goes to the root of all the Services, and of religion itself, for if the doctrines of Predestination, and Election, and Reprobation are to be received as the faith of the Church, where is the necessity for prayer at all?

Nothing could be done to reverse the decree of God. What encouragement is there for a person to desire to seek and do the will of God, if he is assured that, long before his birth, his fate was determined by the irrevocable decree of God, for eternal happiness or eternal misery? If these were the doctrines of the early Reformers, and these are the doctrines of our Church, that must be the effect of them, and what then becomes of the declaration in our prayers, that God has promised forgiveness of sins to all who truly repent? Is that limited to the number of the Elect, who alone are to have Faith and Repentance? Is not this calculated to mislead? Upon this hypothesis, when it is said, "Almighty God, our Heavenly Father, who of his great mercy hath promised forgiveness of sins to all them that with hearty repentance and true faith turn to him," it must be understood that this is limited to those "whose hearts he has softened,"—"*Electorum corda, quantumvis dura, gratiose emollit, et ad credendum inflectit; non-electos autem justo judicio suis malitiis et duritiis relinquit.*" It appears to me that this would be a subversion of the whole structure of our Common Prayer. The doctrine is, that the Elect alone can have Faith and Repentance, and consequently can alone hope for the forgiveness of their sins; whereas the Scripture cited in the Prayer Book says, "When the wicked man turneth away from his wickedness that he hath committed, and doeth that which is lawful and right, he shall save his soul alive;" it does not limit this to the Elect; in other words, say that the wicked man cannot turn away from his sins, and repent of his wickedness, and receive forgiveness, if he be not among the number of the Elect. In the Absolution, at the commencement of the Common Prayer, it is said, "He pardoneth and absolveth *all* them that truly repent, and unfeignedly believe his Holy Gospel," and therefore we are taught to "beseech Him to grant us true repentance and his Holy Spirit." And this declaration runs through all the Services, the Collects, and the Communion Service; it is addressed to all who may repent, not confined to those who are of the Elect, whose fate was fixed and determined before they came into existence.

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I do not collect even from the passages which have been cited, that this doctrine of Predestination and Election was the doctrine of Cranmer, Latimer, or Ridley; that they believed it as an Article of Faith, to be inculcated on members of the Church, that they should recognize the doctrines of Predestination, Election, and Reprobation. The Reformers may, individually, have embraced the doctrine of Calvin; but have they declared and embodied it in the Articles of the Church of England, and in our Book of Common Prayer? I apprehend, clearly and decidedly not. Certainly not in the 17th Article; and if it was the belief of those who are to be considered the interpreters of the doctrines of the Church of England, that Election, Reprobation, and Predestination, ought to be Articles of Faith, the Reformers have not collectively, as a body, declared their opinion to be so. Their evidence, therefore, in the passages cited from their writings, is to be regarded as the opinions of private individuals, no doubt most eminent for their learning, their piety, and their knowledge of the Scriptures; and if the Court were now called upon to set about framing a new form of Service, and erecting a new standard of faith for the Church, the opinions of those eminent individuals would undoubtedly weigh most strongly with the Court.

It is, however, impossible for the Court to follow the learned Counsel through all the passages from the writers he cited; their number is so great, and the passages are so long. It is admitted on all hands that there are persons of great weight, and high authority for their learning and piety, who differ in opinion from those learned and pious writers who have been cited by the Counsel for Mr. Gorham. There is, then, a conflict of opinion amongst those eminent individuals, and who is to determine between them? The Court cannot enter into a consideration of the comparative merit or weight of authority of the two classes of writers; it can only look to the public declarations, the standard of the opinions, of the Church. The Court cannot examine and compare the writings of Dr. Jackson and Dr. Waterland, and other individuals, in order to determine whether or not there are certain isolated passages in their writings which

do not entirely agree with passages cited by the other learned Counsel,—not intentionally kept back, I am sure, on the other side, because it was candidly acknowledged that there are passages which do not entirely agree with other passages in the same person's writings; and every one must be aware of this. The Court would feel itself placed in the greatest difficulty in the world if it had to depend upon isolated passages, selected from these various writers, in order to establish the point whether the doctrines of Predestination, Election, and Reprobation were the doctrines of the Church. Names of very high authority undoubtedly do go to the extent of supporting those doctrines; Peter Martyr and Bucer go to that extent; but I do not think that Cranmer can be made responsible for all that Peter Martyr or Bucer may have said or published; it is too much to lay all this upon the shoulders of the Archbishop. Generally, he may have concurred in their opinions, and he may have called in their aid, and he did so, to assist him in the compilation of the Book of Common Prayer of 1549. That first Book of Common Prayer is nearly the same as the second Prayer Book of Edward 6, which was confirmed by Convocation and established by Act of Parliament in the reign of Elizabeth. It was published in 1552, Martin Bucer dying the year before. The Prayer Book of 1549 had been already submitted to Martin Bucer and Peter Martyr, who returned it without any observation upon it; and how could these persons, who were Cranmer's friends, have done this, if they believed in the doctrines of Predestination, Election, and Reprobation, which are not declared in the Book of Common Prayer? Is it clear that, in 1549, the date of the first Prayer Book of Edward 6, these were the opinions of even the German Reformers? Did they adhere to these doctrines? I believe this is not quite so. I find it stated by Bishop Burnet, in his *History of the Reformation*,* speaking of the doctrine of Absolute Decrees, which is the doctrine of Calvin, and said to be that of the early Reformers,—

The Germans soon saw the ill effects of this doctrine. Luther

* 2 vol. (Oxf. 1829), P. i., p. 234.

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changed his mind about it, and Melancthon openly writ against it, and since that time the whole stream of the Lutheran churches has run the other way. But both Calvin and Bucer were still for maintaining the doctrine of those Decrees, only they warned the people not to think much of them, since they were secrets which men could not penetrate into; but they did not so clearly show how these consequences did not flow from such opinions. Hooper, and many other good writers, did often dehort the people from entering into these curiosities, and a *Caveat* to that same purpose was put afterwards into the Article of the Church about Predestination.

So that the Germans themselves had changed their opinions as to the propriety of setting this doctrine forth as a dogma of faith. They soon saw its "ill effects;" Luther "changed his mind about it;" Melancthon "wrote against it;" whilst Calvin and Bucer were for maintaining the doctrine. This may be a good reason why the Reformers did not proclaim and lay it down as a dogma of faith for the Church of England; and, supposing they did embrace the doctrines of Calvin, that seems to be a reason why a "*Caveat*" was put into the Article on Predestination, which was not made a dogma of Faith of the Church of England, but was left open, in order to obtain as many subscriptions as they could. That no determination was come to tends strongly to show that this was not intended to be one of the doctrines of the Church of England.

As I have already said, it is quite impossible to follow the learned Counsel through all the authorities he referred to,—Cranmer, Martin Bucer, Peter Martyr, and the rest of the early Reformers, and the quotations from the *Zurich Letters*. It was said* that Bishop Jewell, writing to Peter Martyr,† stated that the English Reformers had "pared everything away to the quick;" that there was not a difference in doctrine "by a nail's breadth" between themselves and the Germans. I do not recollect whether the date of this letter was before or after the retractation (if it may be so called) of the doc-

* By Dr. Bayford, in his Argument.

† 7th February, 1562. *Zurich Letters*, Elizab. Series (Ed. Parker Soc. 1842), First Forties, p. 100.

trine of Predestination. It does not appear whether Predestination was part of the doctrine in which there was so little difference between them. Whether that doctrine was embraced at that time in Germany, or whether the English Reformers ever went to the extent of Calvin, is not quite ascertained.

Again, in the time of Edward 6, it does not appear that there was a universal consent to the doctrines of Calvin amongst the Reformers; and unless they did go to that extent, it is not to be supposed that Cranmer, Ridley, and Latimer would have expressed opinions privately contrary to those which are the publicly declared doctrines of the Church of England. But even if they have done so, I repeat, it is the collective declaration of the whole body of Reformers, and not the opinions of individuals, however respectable for their piety and learning, that must guide the decision of the Court.

It may be admitted, and strongly admitted, that, in the latter part of the reign of Elizabeth, the doctrines of Calvin had obtained a much stronger hold upon the minds of the people of this country, and that many of the persons who have been referred to did embrace the doctrine of Predestination and Election. But we must recollect that the Articles of 1562 are the same, in effect and substance (with some verbal alterations), as those of 1552, and the Articles of 1562 must be construed by those of 1552, so far as they agree together. If there is any difference in substance, it is to the Articles of 1552 that recourse must be had. But in respect to the doctrine of Baptism there is no difference. In the Articles of 1536, there was a difference; there was an alteration as to the Baptism of infants; one of those Articles contained a declaration with respect to the salvation of infants who were baptized, which was afterwards (in 1549) inserted in a Rubric prefixed to the Confirmation Service, and at the last revision, in 1662, it was transferred to a Rubric at the conclusion of the Office for the Ministration of Public Baptism of Infants. But what I was about to advert to is this: at the end of the Article of 1536, declaring that "infants and children dying in their infancy shall

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undoubtedly be saved thereby," were added the words, "and else not." According to the interpretation of that Article, if children who had been baptized died without committing actual sin, they were saved, "else not." But this damnatory clause (if it may be so termed) was left out in the Rubric of 1549; and it is not any part of the doctrine of the Church of England that Baptism is absolutely necessary to salvation: highly necessary and important it is, where it is to be had. It is the doctrine of many of the authorities referred to by Counsel, that it is not the want of the Sacrament that would deprive us of its benefit, but it is the wilful neglect and contempt of it (for where it can be had, it ought to be had) that will incur the penalty of the loss of salvation.

This appears to me to be the strong ground taken by the learned Counsel for Mr. Gorham, that, the doctrines of the Reformers being Calvinistic, the Articles of the Church, being framed by them, must be taken in a Calvinistic sense. Then you must show how far Cranmer, and Ridley, and Latimer, and the other Reformers of our Church, adopted the doctrines of Calvin as the doctrines of that Church. Their private opinions are not sufficient. The Court cannot travel through a long list and chain of authorities, in order to see how far each individual went in his acknowledgment of these doctrines; it must determine the question upon the general acts of the Church, publicly declared as the acts of the body, and not upon the opinions of individuals.

I have said that, in the latter part of Queen Elizabeth's reign, these doctrines had taken strong possession of the minds of the people of this country. We know that, in the interval between the reign of Edward 6 and the accession of Elizabeth, in the reign of Mary, a great number of clergymen left this country and went into Germany, and thus, coming into communication with the German Reformers, imbibed much of their principles, and undoubtedly many of them, during their residence abroad, did receive very strong impressions in favour of the doctrines of Calvin. But this was not the case with all, and these doctrines were not re-

ceived here generally in 1562; though there is evidence to show that, at the University of Oxford, the books from which a choice was given to the students were of a Calvinistic character,—for it appears from Wood's *Historia et Antiquitates Universitatis Oxoniensis*,* that, in the year 1596 [1579], the works for the selection of the lower classes of students consisted of Nowell's *Greater Catechism*, Calvin's *Catechism*, Hyperius's *Elements of the Christian Religion*, and the *Heidelberg Catechism*; for the higher classes, Bullinger's *Catechism for Adults*, Calvin's *Institutes*, the *Apology for the Church of England*, or the *Articles of the Church of England*. Nor was the University of Cambridge much behind in this respect; for we find that, about this time, a very serious question arose with respect to the Calvinian doctrines, and we have an account of that dispute in Strype's *Life of Archbishop Whitgift*.† What was the result? A member of that University had preached a *Concio ad Clerum*, in which he not only attacked the writings of Calvin and Bucer, but indulged in personal invectives against them, and a complaint was made by the Heads of the University to Archbishop Whitgift; they had ordered the preacher to retract what he had said, and, not being satisfied with his retraction, they applied to Archbishop Whitgift to interfere. He did interfere, and a more satisfactory retraction was obtained; but the Archbishop did not approve of the proceedings of the University. When that question between the University and the Archbishop was settled, the former induced the Archbishop to lay down some rules, to confine the disputations in the Schools and the *Conciones ad Clerum* within certain bounds; and this led to the Nine Propositions, called the "Lambeth Articles," which were drawn up in 1595 by Archbishop Whitgift, Dr. Whitaker, Regius Professor of Divinity, and two Bishops, and were sent down to Cambridge. What was the consequence? These Propositions went the full length of the whole doctrines of Calvin; but they were not approved, and were

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* 1 vol. (Oxon. 1674), p. 296.

† Life and Acts of Archbishop Whitgift (Lond. 1718), B. iv. cc. 14—18.

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not permitted to remain in force; the Queen insisted that they should be suspended, and Archbishop Whitgift was obliged to comply. But another circumstance occurred shortly after; Dr. Baro, Lady Margaret Professor of Divinity, preached against the doctrines of Calvin and Bucer, and with the same result. These Lambeth Articles were to have formed the authority for proceedings against him; but, as I said, they were suppressed by the Queen, who was displeased with them, either because her prerogative was invaded, or because they had been set forth as containing the doctrines of the Church of England; and Archbishop Whitgift was obliged to consent. This was all done by private individuals, in their private capacity, and I can only look at these matters as the private opinions of Archbishop Whitgift, Dr. Baro, and others, which can have no binding effect upon anybody, and cannot influence in any measure the decision of a Court. But after the death of Queen Elizabeth, the Lambeth Articles, which had been suppressed by her, seem scarcely to have been heard of. At the Conference at Hampton Court, King James had never heard of them, and did not understand what they were. They were explained to be propositions relating to some controversies at Cambridge concerning Predestination. This may be found in Cardwell's *Conferences*.*

A good deal has been said about Archbishop Bancroft,—or not so much about his opinions as those of Mr. Rogers, his chaplain. But I think there is good reason to doubt whether the opinions of Archbishop Bancroft were very accurately expressed by his chaplain Rogers; for I find in Lord Clarendon's *History of the Rebellion*† the following account of the death of the Archbishop:—

He had scarce performed any part of the office of a Bishop in the Diocese of London when he was snatched from thence and promoted to Canterbury upon the never-enough lamented death of Dr. Bancroft, that Metropolitan who understood the Church excellently, and had almost rescued it out of the hands of the Calvinian party,—

* *History of Conferences* (Oxf. 1840), c. iv. p. 185.

† B. i. p. 68 (Oxf. 1702).

This does not look like favouring the Calvinistic doctrines :—

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and very much subdued the unruly spirit of the Nonconformists, by and after, the Conference at Hampton Court; countenanced men of the greatest parts in learning, and disposed the clergy to a more solid course of study than they had been accustomed to; and if he had lived would quickly have extinguished all that fire in England which had been kindled at Geneva; or if he had been succeeded by Bishop Andrews, Bishop Overal, or any man who understood and loved the Church, that infection would easily have been kept out, which could not afterwards be so easily expelled.

In Cardwell's *Conferences** it appears, very much to the same effect as I have quoted from Clarendon, that, had he lived, he would have driven out the Calvinistic doctrines :—

After this, the doctor (Reynolds) moved that this proposition, "the intentions of the Minister is not of the essence of the Sacrament," might be added unto the Book of Articles, the rather because that some in England had preached it to be essential: and here again he remembered the nine orthodoxal assertions concluded at Lambeth. His Majesty utterly disliked that first part of the motion, for two reasons.

These he stated, and the Bishop of London (Dr. Bancroft) seems at the time to have denied the orthodoxy of the Lambeth Articles.

To the other part for the nine assertions, his Majesty could not suddenly answer, because he understood not what the Doctor meant by those assertions or propositions at Lambeth; but when it was informed his Majesty, that by reason of some controversies, arising in Cambridge, about certain points of divinity, my Lord's Grace assembled some divines of especial note, to set down their opinions, which they drew into nine assertions, and so sent them to the University, for the appeasing of those quarrels; then his Majesty answered; "first, that when such questions arise among scholars, the quietest proceeding was, to determine them in the Universities, and not to stuff the book with all conclusions theological. Secondly, the better course would be to punish the

* Second Day, c. iv. p. 184.

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broachers of false doctrine, as occasion should be offered: for were the Articles never so many and sound, who can prevent the contrary opinions of men till they be heard?"

Upon this, the Dean of St. Paul's referred to the controversy at Cambridge, and spoke of some teaching that all persons once truly justified, though they fell afterwards into grievous sins, and died without repentance, were yet saved:—

In utter dislike of this doctrine his Majesty entered into a longer speech of Predestination, and Reprobation, than before, and of the necessary conjoining repentance and holiness of life with true faith: concluding, that it was hypocrisy, and not true justifying faith, which was severed from them: for although Predestination and Election depend not upon any qualities, actions, or works of man, which be mutable, but upon God his eternal and immutable decree and purpose; yet such is the necessity of repentance, after known sins committed, as that, without it, there could not be either reconciliation with God or remission of those sins.

Bancroft was a person likely to drive all Calvinian doctrines out of the Church; for Bancroft's real opinions I take from Clarendon's *History of the Rebellion*.

I am, therefore, of opinion that the private opinions of these individuals, their learned opinions, are not authorities by which the Court is to be guided; that they are only expressive of their own sentiments, and can have no binding effect on the Court, unless you can show that the words of the Public Services of the Church cannot be construed but in an ambiguous sense. If the words are indeed doubtful or ambiguous, and they cannot be construed by reference to other Services and acts of the Church, then it might be right and proper to advert to the opinions of these persons; but so long as the Articles and Services of the Church are reconcilable, and not only reconcilable, but necessarily consistent, according to the usual and ordinary interpretation of the words, you are not at liberty (as Bishop Conybeare says) to put another and a different interpretation upon them; but you must take the doctrines laid down in the Baptismal Services, and in other Services, and the

Rubrics and Articles,—which were adopted by the Church and confirmed by the Legislature,—you must take those doctrines and expressions in their true and literal sense, and not indulge in any fanciful explanations founded upon opinions expressed by private individuals.

This, I think, would dispose of this part of the question : for I protest against being obliged to go through all the authorities which have been cited (very properly) at the Bar. The Articles must speak for themselves ; their language is precise and determinate, and is not, I repeat, to be interpreted by the opinions of individuals.

I am not aware that it is necessary for the Court to Result : occupy more time upon this question. The point to be ascertained is, the doctrine of the Church of England—does the Church hold the doctrine of Baptismal Regeneration or not ? Another point is,—does Mr. Gorham deny that doctrine ? It is clear from the whole tenour of his examination, and from the Argument of his Counsel, that he does,—that he is opposed to the doctrine of Baptismal Regeneration. He says that the child must receive an act of grace to make the Sacrament of Baptism of beneficial effect ; that the sign is not the thing signified. Undoubtedly it is not ; but I say the Church has declared that, at the moment of Baptism, the child does receive the benefit of the new birth ; for though the words may appear to have a reference to the Roman Catholic doctrine of the *opus operatum*, that the child receives spiritual regeneration at Baptism ; spiritual regeneration, according to the Articles and Formularies of the Church, is given at Baptism ; spiritual regeneration is prayed for, and thanks are given for spiritual regeneration received. Therefore, if it be the doctrine of the Church of England,—and it is declared to be so,—that children are regenerated at Baptism, and are undoubtedly saved if they die before committing actual sin, Mr. Gorham does maintain doctrines opposed to those of the Church of England.

Then what is the consequence ? Has the Bishop of Exeter shown sufficient cause why he should not institute Mr. Gorham to the Living of Brampford Speke ? If he has, then the Bishop is entitled to be dismissed, and with

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maintained by
the Presentees
opposed to that
of the Church.

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The Bishop dismissed.

Proctors:—*Bowdler*, for Mr. Gorham; *Toller*, for the Bishop of Exeter.

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AUGUST 9.

HAYNES v. HILL.—*Cause.*—This was a business of a testator, at the foot of a duly-executed and attested will of 1833, made two codicillary additions, dated in 1833 and 1836, and five similar additions in 1840, 1843, and 1844, all of which were unattested, and in 1847 duly executed a codicil, on a separate paper, described as a "codicil to his will."—Held, that the five unattested codicillary additions of 1840, 1843, and 1844, were not rendered valid by the codicil of 1847, not being proving divers codicils to the will of Mr. George Haynes, who died 21st January, 1849, promoted by his relict, residuary legatee for life, named in the will, against Mrs. E. G. Hill, one of the children of the deceased, and one of the substituted residuary legatees; the executors having renounced.

The will (A), which bore date 9th April, 1833, consisted of six sheets of brief paper, attached to each other in the usual manner, the body of the will terminating about the middle of the fifth sheet, the sixth or outside sheet having been endorsed "Will of George Haynes, Esq." It was signed by the deceased, and attested by three witnesses. This instrument was not in dispute. Two additions (A 1 and A 2), written on the lower half of the fifth sheet of the will, and dated respectively 5th November, 1833, and 1st January, 1836, unattested (considered as codicils, though not so described), were likewise not disputed, being prior in date to the Wills Act. Other additions, immediately following, on the back of the fifth sheet and the inside of the sixth or outside sheet, namely, A 3, dated 2nd December,

1840, A 4, dated 1st December, 1840, A 5, dated 12th June, 1843, A 6, dated 4th February, 1844, and A 7, dated 16th December, 1844, were likewise signed by the testator, and unattested. On a separate paper (C) was written a codicil, dated 11th March, 1847, commencing, "By this codicil to my will," which contained a bequest to the testator's wife, "independently of all other bequests in my said will." This codicil was duly executed by the deceased and attested by two witnesses.

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at the time
of its execution
part of the will
of the testator.

The Allegation propounding these papers pleaded the before-mentioned facts, and that the testator, who had been a merchant at Trieste, returned to this country in the autumn of 1847, having previously (in June, 1847) deposited a sealed packet with his confidential clerk, containing his will and the papers A 1 to A 7, inclusive,—the cover or envelope (B) being brought into the Registry,—which packet was, in 1848, brought to England by a friend of the testator, and delivered to R. G., in whose custody it remained until the testator's death, when it was opened in the presence of his family. It further pleaded that the codicil (C), which was dated at Trieste, and was not enclosed in the same envelope as the will and additions, was found, after the testator's death, locked up in his private writing-case.

The admission of this Allegation was opposed, the real question being whether, on this state of facts, the additions to the will, marked A 3 to A 7, were rendered valid by the execution of the codicil (C).

Dr. Haggard and *Dr. Jenner*, in opposition to the Allegation.—The papers in question were not codicils at the time of their execution. The rule of law is binding in this case. Codicils, to form part of a republished will, must be executed codicils. *Smart v. Prujean*.* *Croker v. Hertford*.† *Re Hutton*.‡ The object of the Allegation is to induce the Court to grant probate of unexecuted papers as codicils,

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* 6 Ves. 565.

† 3 Notes of Ca. 150.

‡ 5 Notes of Ca. 598.

AUG. 9. simply by virtue of a codicil referring to the will, but which does not in terms ratify or refer to them.
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Sir J. Dodson, Q.A., and Dr. R. Phillimore, in support of the Allegation. We say that the five codicils, A 3 to A 7, are rendered effectual by the subsequent codicil (C) of 1847. There is a wide distinction between the cases of *Smart v. Prujean* and *Croker v. Hertford*, and this case. Here the codicils are written on the same paper, and were found in the same place, and all were endorsed as "the will" of the testator. The execution of a codicil makes valid all alterations in the will. These seem to be alterations and additions, intended to be confirmed by the last instrument, rather than codicils. *Re Wollaston.* Ingoldby v. Ingoldby.† Skinner v. Ogle.‡* The question is, what the testator meant by "will" when he executed the codicil (C). He has shown throughout that he considered these memoranda as part and parcel of his will. This is the first time the Court has been called upon formally to decide this question where the scripts were upon the same paper. *Re Barke.§ Re Mogg.||*

JULY 20.
 JUDGMENT.

SIR H. JENNER FUST.

These papers, it is clear, cannot be entitled to probate *proprio vigore*; therefore, if they are to be considered as forming part of the will of the deceased, they must be made so by means of some other instrument, entitling them to the probate of the Court, as additions or codicils to the will of 1833. The question is, whether any other document, signed by the deceased and executed according to the requisitions of the Statute, will give effect to them.

The paper of 1847, which is called a codicil,—the others are not called codicils, and are not described by any title,—is posterior in date to all the papers written by the deceased. That is signed by him, and is attested by two witnesses. This paper was found separate and apart from the others,

* 3 Notes of Ca. 599.

† 4 Notes of Ca. 74.

‡ 1 Notes of Ca. 323.

† 4 Notes of Ca. 493.

§ 4 Notes of Ca. 44.

and the question is, whether this codicil has or has not such an effect as will give operation to the previous papers, as a republication of those papers, and making them, therefore, codicils duly executed; that is, whether this paper should have the effect of rendering valid instruments which are in themselves null and void.

The question, undoubtedly, is one of very great importance to the parties, and there is a difficulty which necessarily attends the raising of it in the present shape, because the Allegation propounds all these papers as together containing the will of the deceased, and the latter as the codicil. Therefore part of this Allegation is necessarily admissible. If the Court should be of opinion that those additions which bear date after the 1st January, 1838, cannot be considered as parts of the deceased's will, still that part of the Allegation which propounds the will, the two additions A 1 and A 2, and the last codicil, must be admitted to proof. The Allegation, under these circumstances, would require to be reformed.

The codicil which bears date the 12th June, 1843, is to this effect: "I hereby nominate and appoint, as joint trustee and executor under this my will, Edward James Smith, Esq., my brother-in-law, instead of my friend, Charles Porcher Long, Esq., deceased, and having assigned over to the Imperial Life Insurance Company," &c. This was pointed out by Counsel as showing that the testator considered this as an additional part of the will; and undoubtedly such would be the interpretation of that codicil,—that he considered it a part of his will, and one of the other additions has reference to the body of his will. Therefore it is contended that it is quite clear the deceased himself considered and intended that these papers should operate as part of his testamentary disposition. Of that intention the Court has no doubt whatever; but the question is, not what the deceased intended, but whether he has put his intention into such a shape that the Court can give effect to it. This is not the first time the question has arisen; it has occurred several times, particularly in the *Marquess of Hertford's Case*, when the whole subject was considered.

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The codicil of 1847 confirms and republishes the will,—of that there can be no doubt, because every codicil is a republication of the will,—and this is a codicil of 1847, which, therefore, has the effect of republishing the will of 1833, together with the two codicils which bear date before the 1st January, 1838. It is true that, over and over again, it has been ruled, here and elsewhere, that a paper informally executed, not having effect in itself, may, by the execution of a subsequent instrument, have operation; and, under the Statute of Frauds, a paper, not sufficient to pass real estate in itself, has been rendered effectual by the execution of a subsequent codicil duly executed.

The paper of 1847 republishes the will. The question then arises, What is the will? The will, before the execution of these codicils, was the will of 1833, together with the two codicils of 1833 and 1836. That was the whole of the will; a codicil, therefore, which republishes the will, republishes the will and these two codicils, but I am afraid has no effect whatever upon the other papers, which are considered to be additions to the will, though the deceased may have meant and intended to refer to these papers under the description of "will," as well as to the main substance of the will and the two codicils A 1 and A 2. I am afraid, according to the *Marquess of Hertford's Case*, that the including under the description of "will" that which is no part of the will, is not sufficient. I cannot find a distinction between that case and the present. I regret that, unfortunately, the Court is so placed that it cannot give effect to the intentions of the deceased. I cannot consider these additions as part of the will of the deceased, legally and technically speaking. There being an instrument legally entitled to the character of a will, and two codicils, here is a third codicil, which republishes the will. I cannot understand that there is any ground upon which this case is to be distinguished from that of the *Marquess of Hertford*. It is unfortunately a case in which the intentions of the deceased must be defeated; but the Court is bound by the decision of the superior Court in that case, which affirmed the decision of this Court, on principle.

The Court was pressed, if possible, to determine the case on the admission of the Allegation; but the Court is placed under some difficulty, because there are several alterations in the papers, and the will is propounded and the first two codicils. In the codicil of 1847 there are interlineations, identified by the initials of the deceased in two places, and which are pleaded to have been made before the execution. All I can do, having expressed my opinion as to what the general result will be, is, to direct the Allegation to be reformed, by striking out all the articles which refer to the execution of the papers A 3 to A 7.

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*Haynes v. Hill.*Allegation to
be reformed.

Ultimately, at the petition of both Proctors, the Judge Aug. 9. rescinded his decree of the 20th July, wherein he had directed the Allegation to be reformed, and rejected the Allegation; and, by Interlocutory Decree, with the consent of the Proctor for the party opposing, he decreed Letters of Administration, with the papers A, A 1, A 2, and C, as the will, with three codicils of the deceased, to be granted to Mrs. Haynes, relict, and residuary legatee for life named in the will.

Proctors :—*Bathurst*, for the party propounding the papers; *Currey*, for the party opposing.

END OF TRINITY TERM, AND OF THE SITTINGS
AFTER TERM.

MICHAELMAS TERM, 1849.

High Court of Admiralty.

1st Sess.

NOVEMBER 6.

In a cause of salvage, certain parties alleged by the salvors to be necessary witnesses, and who had refused to make affidavit in support of their affidavit on their behalf.

THE "GLORY" (GOLDER). — *Motion.* — This was a cause of salvage by Act on Petition, in which certain boatmen of Lowestoff sought a remuneration for services rendered to the vessel when upon the sand. Several persons, including the agents for Lloyd's, at Lowestoff, whose evidence was required by the salvors, had refused to make

Act, were summoned by *sub-pœna* before the Court, and examined *vidvoco*, under the 3 & 4 Vict. c. 65. — Form of examination.

Dr. Jenner, for the salvors, moved the Court, upon affidavit, to issue *subpœnas*, summoning the individuals so refusing to appear before the Court, that they might be examined by word of mouth, under the 3 and 4 Vict. c. 65, sec. 7, their evidence being essential to the due administration of justice. The Court has already intimated its readiness to exercise this power given by the Statute. *The*

*"Ripon."**

Dr. Harding, for the owners, offered no opposition to the Motion.

JUDGMENT.

DR. LUSHINGTON.

The first question is, whether, under the circumstances of this case, it is proper and fitting that a *subpœna* should issue for the examination of these witnesses. The 3 and 4 Vict. c. 65, sec. 7, gives the Court power and authority to cause witnesses to be examined, if it shall think fit. Such power is conferred by the Act, provided that, upon a review of all the circumstances of the case, the instance shall

* 6 Notes of Ca. 247.

appear to be one in which the Court ought to exercise its power. Of course power is not given for the Judge to exercise without due discretion; on the other hand, if the case requires it, the Judge is not at liberty to refuse to exercise the power which the Legislature has conferred upon the Court. That narrows the question simply to this: whether the facts stated in the Act on Petition and in the affidavit of William Seago are sufficient to induce the Court to conclude that it ought to exercise its authority.

It would be useless to go through the facts. I have read all the papers, because it was necessary, in order to form an opinion on the case. One of the most material facts put in issue is, whether or not this vessel, when lying on the sand, required for her safety that the cargo should be unladen, and what was the real condition of the master, who is represented to have been in a state of intoxication. The Act on Petition contains express reference to the individuals now sought to be examined, and Mr. Seago states that application has been made, and they have refused to give their evidence by affidavit, in the usual form. It really does appear to me that this is one of the cases which the Legislature must have contemplated when it passed the Act, namely, that when parties, in denial of justice (for reasons which may appear to them satisfactory), refuse to come forward and make a statement of the facts in issue, and so deprive the Court of that evidence which may be essentially necessary for the decision of the case, according to the principles of truth and justice, the Court may compel their attendance. If there had been any negative of the affidavit made by Mr. Seago, or if any disposition had now been shown on the part of the owners to prove to the Court that these witnesses were ready to come forward and make an affidavit in ordinary form, the Court, seeing the inconvenience which may arise from the exercise of its power, would be disposed to avoid carrying it into execution; but as there is no prospect of having the benefit of the witnesses except by exercising this power, I think I am bound to do it.

Having settled the preliminary question, as to the propriety of issuing the *subpœna*, the next point is, in what

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Glory.

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Glory.

mode the Court will carry the Act into execution. It is not very easy to come to a determination, at least without more consideration than I have had an opportunity of giving to the case, and without the benefit of discussion by Counsel, as to what is the precise intent and meaning of the Act with respect to the mode of execution. The 7th section enacts "That, in any suit depending in the High Court of Admiralty, the Court, if it shall think fit, may summon before it, and examine, or cause to be examined, witnesses, by word of mouth." This can look to nothing else than a *viâ voce* examination, and it gives the Court the power of examining them, or causing them to be examined by some other person. It is perfectly silent as to whether the examination, *viâ voce*, shall be by an Examiner or by Counsel, or by any other means. "And notes of such evidence shall be taken down in writing by the Judge or Registrar, or by such other person or persons, and in such manner, as the Judge of the said Court shall direct." This looks very much like an examination either conducted by the Judge alone, or by an Examiner appointed by the Judge; the Registrar taking down the evidence as it is given. But it appears to me that there is nothing in this Act which would exclude the Court, provided it thinks fit, to direct the examination to be conducted in the same way in which it is ordinarily done in cases at *Nisi Prius*. When the Court has this example before it, it would be exceedingly averse to introduce another mode. So long as the Court proceeds in the ordinary accustomed course of having evidence by affidavit, I have no disposition to disturb it; but if I am bound to commence a new course, and either examine the witness himself or cause him to be examined, it is only consistent with justice that the examination should be attended with a cross-examination. It is very true that the Court has power, if it thinks fit, to examine the witnesses itself; but the Court would be exceedingly reluctant to exercise that power, because I should not like to take upon myself to determine what were the proper questions to be put. It is probable that I might omit many questions which Counsel thought important; or if Counsel suggested them, and the Court adopted them, I might not ask the witnesses to an

extent that would be satisfactory to the parties. Therefore, my impression is, that the witnesses should be examined first by Dr. Jenner, then cross-examined by the Counsel for the owners, and of course there will be a re-examination. If the Court thinks it necessary to put any questions to elucidate a point, of course it will do so.

Counsel will see that this is a great power given to the Court, and that it ought not to be exercised unless it is necessary. Let the case stand over untill next Court-day, to see if these gentlemen are willing to give their evidence on affidavit; if they are not, then let the *subpœna* issue.

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The parties still refusing to make affidavits, the *subpœna* issued, summoning them to appear in Court, to undergo examination, upon the 28th. Nov. 16.

Upon that day, they appeared, in obedience to the *subpœna*, and, after the oath had been administered by the Judge, underwent examination *viâ voce* by the Counsel for the salvors; they were then cross-examined by the Counsel for the owners, and re-examined, questions being afterwards addressed to them by the Judge. Nov. 28.

Proctors:—*Jenner*, for the salvors; *Nicholl*, for the owners.

Prerogative Court of Canterbury.

NOVEMBER 8.

1st Sess.

IN THE GOODS OF HOOD HANWAY CHRISTIAN, ESQ., DEC. A testator, having executed his will, which was duly attested, made an addition thereto, which was continued on the next page of the paper, where it was again signed.

—*Motion, ex-parte.*—The deceased, a Rear-Admiral in the Royal Navy, died on the 31st August, 1849. On the 14th February, 1848, being then at Malta, he made and executed his will, written on two sides of a sheet of letter-paper, the execution being attested by three witnesses. Immediately after the execution, it was suggested to the deceased by one of the witnesses, that he had not mentioned his daughters

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Nov. 8. in his will; whereupon the deceased, before either of the witnesses had left his presence, inserted the following words (in continuation of the will), commencing before the attestation-clause: "My daughters being all provided for by my Marriage-Settlement, whom I" [then carrying the sentence on at the top of the next (third) page] "request my Son will present with mourning and rings." Under these last words followed the signature of the deceased (again), and the initials of the three witnesses beneath the word "witness." The whole transaction was continuous, the deceased and the witnesses having never quitted the room or each other's presence until the conclusion.

Christian, dec. ed by the testator, and attested by the initials of the witnesses: — Held, that the will and addition were entitled to probate as the will and codicil. — The initials of witnesses are a sufficient subscription.

Dr. Addams moved for probate as of the will and codicil of the testator.

DECREE.

SIR H. JENNER FUST.

This is an odd case; but I have no doubt as to granting probate. There is a difficulty as to the initials of the witnesses; but I do not know that it is necessary that witnesses should actually sign their names; if they sign their initials, it is a sufficient subscription and attestation. Let probate of the will and codicil pass.

Probate decreed.

F. Clarkson, Proctor.

Signature of the deceased not at the foot or end of the will.

IN THE GOODS OF FREDERICK HEARN, DEC.—*Motion, ex-parte.*—The deceased died 20th August, 1849, leaving property under £200. A will having been prepared for him, written on four sides of a sheet of paper, a space being left on the fourth side for the date, on the 5th March, 1844, he executed the same, in the presence of two witnesses, by signing his name on the right hand of the attestation-clause, at the lower part, writing the date immediately after his signature, and having so done, the witnesses, by his direction, signed their names above that of the deceased, instead of under the attestation-clause. The paper, therefore, presented the following appearance. It concluded, "In witness whereof, I, the said Frederick Hearn, have to this my

last will and testament set my hand the"—. Then followed,
a blank space of about an inch intervening,

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Hearn, dec.

Signed by the Testator,
Frederick Hearn, in the
presence of us, present at
the same time, who have
hereto subscribed our
names as witnesses, in the
presence of the said Tes-
tator and of each other.

Arthur Podmore
William Almond

Frederick Hearn
March 5, 1844.

Dr. Addams moved for probate.—The Court will not be so rigid in its construction of the Act as to say that the signature is not at the foot or end of the will. [PER CURIAM. —There is a large space between the signature and the conclusion of the will. After the case of *Smee v. Bryer*,* where am I to stop?] There could be no intention of adding to the will.

SIR H. JENNER FUST.

DECREE.

The question is, whether the signature is at the foot or end of the will. There can be no reason why the deceased should not have signed his name at the *testimonium*-clause. There is a space amply sufficient. I am afraid the Court must hold, in this case, that the signature is not at the foot or end of the will. The Court is very unwilling to come to this conclusion; but after the decision in *Smee v. Bryer*,—though that case was in some respects different,—the Court has no alternative. Here there was sufficient space at the end of the *testimonium*-clause, and there is no reason whatever suggested for placing the name where it is. I cannot decree probate of the paper, and I must reject the Motion.

Probate
refused.

F. Clarkson, Proctor.

IN THE GOODS OF JOHN CHARLES ODELL, DEC.—*Motion, ex-parte*.—The deceased died 11th April, 1849. The

* 6 Notes of Ca. Supp. xli.

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Odell, dec.

preceding day, he made a will, appointing C. V. sole executor, which was written by C. V. on a printed form, and occupies the whole of the first two sides or pages, the concluding words, "Witness my hand given this tenth day of April in the year of our Lord one thousand eight hundred and forty-nine," coming down so close to the bottom of the second page as to leave no room for the signature of the deceased. On the third page, about two inches from the top, and a little above the centre of the page, is written the attestation-clause, at the foot of which the deceased placed his signature; and below that the witnesses subscribed their names, opposite to the word "witnesses." The drawer, C. V., in his affidavit, stated that, after he had written the will and the attestation-clause, the deceased and both of the witnesses being present, some observations were made in respect to the former being unable to sign his name on the second side of the paper, by reason of the writing being brought close to the end, whereupon W. B., one of the witnesses, suggested that the deceased should sign close by the attestation-clause, which he accordingly did.

MOTION.

Sir J. Dodson, Q.A., moved for probate. This case differs from that of *Smee v. Bryer*,* where there was room at the bottom of the page for the signature, though not for a formal attestation-clause. [PER CURIAM.—Why was not the signature here put at the top of the third page?] One of the attesting witnesses suggested that the deceased should sign "close by the attestation-clause." In *Re Brown*,† the Court admitted a paper signed by the testator below the attestation-clause (which was on a separate page), considering that clause as part of the will.

DECREE.

SIR H. JENNER FUST.

Here is a larger space left than in the preceding case. Why was not the signature written at the top of the third page, where there is ample space? I cannot consider this signature to be at the foot or end of the will. Because in certain cases the attestation-clause may be considered as

* 6 Notes of Ca. Supp. xli.

† 6 Notes of Ca. 698.

part of the will, am I to hold in all cases that a signature after the attestation-clause is a signature at the foot or end of the will? Suppose the attestation-clause should come quite low down the page, would a signature there be at the end of the will? I see no distinction between this and the other case, and I, therefore, reject the Motion.

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*Odell, dec.*Probate
refused.*Rothery, Proctor.*

Several other cases, very similar to the foregoing, Similar cases. occurred the same day, in which the Motions were rejected on the same grounds; *ex.gr.*

"IN THE GOODS OF JOHN HILL," the testator, who was *Re Hill*. of the profession of the law, left a will and two codicils. The second page of the last codicil (written by him when advanced in age and very infirm) ended thus: "I wish to express my thanks to my executors, W. N. W. and E. E., Esqrs., in this my third [*sic*] codicil, to whom I give the sum of fifty pounds each for the trouble they have kindly undertaken for me." Immediately below this was the signature of the testator (which was likewise at the end of the first page); and on the top of the third page were the words, "I give and bequeath my law library to my eldest son." After a blank space of somewhat more than an inch, was the attestation-clause, in the testator's handwriting: "Signed, sealed, published, and declared by the above John Hill, as a second codicil to his last will and testament, in the presence of us, who, in his presence, and at his request, and in the presence of each other, have hereunto subscribed our names as witnesses, this 19th day of September, 1848." At the foot of this clause were the signature and seal of the testator; and on the left side, lower down, three names were subscribed under the words "witnesses to the signature." In support of the Motion for probate, *Dr. R. Phillimore* argued that this case did not fall within that of *Smee v. Bryer*; that the Court had held that blanks in the body of a will would not invalidate it, and that the attestation-clause was part of the will; that the opinion of Mr. Justice Wil-

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Hill, dec.

liams,* upon the decision of the Judicial Committee, in *Smee v. Bryer*, was: "It seems now to be established that, notwithstanding the will contains a complete disposition of the property and an appointment of an executor, if there is an unnecessary and unreasonable blank space left between the conclusion of the will and the signature of the testator, the will is ill executed:" whence it followed that the question in each case was, whether the space left was unreasonable or unnecessary. THE COURT, in rejecting the Motion, said: "After the bequest of his law library to his eldest son, at the top of the third side, there is ample room for the name of the testator, and what possible reason can be suggested why he did not sign it there? Generally speaking, the proper place for the signature is at the foot or end of the dispositive part of the will; but where the attestation-clause is at the close of the dispositive part, and the signature immediately follows, the Court has held that it is sufficiently at the foot or end of the will. Here, however, the attestation-clause is at a distance from the dispositive part. I am very sorry to be obliged to defeat the intentions of the testator, but what am I to do? Where am I to stop?"

Re Weaver.

"IN THE GOODS OF SAMUEL WEAVER," the testator had made a codicil to his will in December, 1847, on the second side of which, after the appointment of executors, there was a blank space of nearly two inches, and then came a full and formal attestation-clause, at the foot of which appeared the signature of the testator, and on the left side the word "witnesses," and two names, with the date. *Dr. R. Phillimore* endeavoured to show an analogy between this case and that of *Standley*,† but THE COURT rejected the Motion, observing: "The space is here larger than in the last case. Why did the testator not sign his name at the end, properly speaking, of the will? The Act requires that the signature should be at the foot or end of the "will." Under certain circumstances, the attestation-clause may possibly be consi-

* On Executors (4th Ed.), 1 vol. p. 68.

† *Antea*, p. 69.

dered as part of the will, where there is no room for the insertion of other legacies; but I give no opinion as to what is a good execution by a signature at the end of the attestation-clause; it must depend upon the circumstances."

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Weaver, dec.

In disposing of the last of these cases, "IN THE GOODS OF *Re Dunn*. JAMES DUNN," THE COURT said: "It must be understood that the Court will construe the Act strictly in future."

IN THE GOODS OF WILLIAM MILLIGAN, DEC.—*Motion, ex-parte*.—The deceased, master of a merchant ship, died at sea, on the 16th May, 1849. He left London in command of the ship on the 3rd August, 1848, and on the 5th, whilst in Margate Roads, waiting for a fair wind, wrote, addressed, and sent by post, to his wife a letter, dated "Margate Roads, 5th August, 1848," which commenced, "My dear Margaret, Thus far on my Journey it is now blowing strong gales from the Westered," and related to private and domestic matters, but contained the following passage: "Life is uncertain in the event of me being parted for ever in this world I wish you to have and bequeath every thing that I am in possession of goods Money Ships or Land or all debts due me or all moneys coming by any way whatsoever I hope none of Friends will offer to deprive you any such property during your natural life I have not made any will you being protected by your Marriage Settlement of two-thirds and I should not wish my heirs at law to interfere with you in matters of mine." The letter was signed by the deceased, but was unattested. It was proved to be in his handwriting, and no other paper of a testamentary nature had been left by him. The deceased died without child or parent, leaving, besides his widow, three brothers, his only next of kin. Only one of the brothers resided in this country, who signed a proxy of consent to administration being granted to the widow, and a Decree with the usual intimation issued against the other brothers resident in Van Diemen's Land.

A letter written by a mariner in Margate Roads, unattested, containing dispositive words, admitted as his will, under sec. 11 of the Statute.

Nov. 8. *Dr. R. Phillimore* moved for administration with the will annexed to the widow, as universal legatee named therein; citing *Passmore v. Passmore*.*
Milligan, dec.

DECREE.

SIR H. JENNER FUST.

Generally speaking, under the Wills Act, this paper, though containing dispositive words, would not be a valid will; but an exception is made in the 11th section of the Act in favour of wills made by mariners "being at sea." I have no doubt, therefore, that this paper is entitled to probate as the will of the deceased. The words, "I have not made any will," mean "I have not made any other disposition of my property by will." One of the brothers having executed a proxy of consent, and the others having been cited, and no appearance being given, I decree administration with the paper annexed. It is not necessary that there should be justifying security, the other parties not being entitled to the grant. Where the parties cited are entitled to the grant in priority, justifying security is required.

Townsend, Proctor.

A paper, in which an addition, containing a specific bequest and an appointment of executors, was below the deceased's signature, and interposed between the signatures of the two attesting witnesses,—refused probate, on Motion.

IN THE GOODS OF MARTHA TOPHAM, SPINSTER, DEC.
 —*Motion, ex-parte.*—The deceased died in July, 1849, without parent. On the 16th of that month, Miss Ann Maria Scott wrote from her dictation a paper, purporting to be her will, containing various bequests, at the end of which the deceased's signature was subscribed; and beneath the following signatures and words appear:—

Elizabeth Rogers Witness.

To Mary my Gold Chain I appoint Frederick James Harrold, and William Thomas Scott Executors Ann Maria Scott Executrix.

Witness

Ann Maria Scott.

Miss Scott, the drawer of the paper, and Mrs. Rogers, the other attesting witness, in their affidavit, stated that

* 1 Phill. 216.

when the deceased signed the will, in their presence, Mrs. Rogers subscribed her name, as attesting the execution; that Miss Scott, then, from the further dictation of the testatrix, wrote the addition beneath the signature of Mrs. Rogers, and immediately thereupon subscribed the paper, writing her name beneath the addition, in the presence of the deceased and her co-witness.

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Topham, dec.

Dr. Harding moved for administration with the will annexed, without the addition between the subscriptions of the attesting witnesses; citing *Keating v. Brooks*,* *Re Davis*,† and *Re Howell*.‡ [PER CURIAM.—Here one witness attests the signature of the deceased in one part of the will, and the other signs her name to another part of the will, which is not signed by the deceased.] They both meant to attest the signature of the deceased; where they sign is immaterial; the Act assigns no place for the signatures of witnesses, and they may sign at any interval of time, if the parties do not leave the room. There is no case precisely in point as to the gold chain.

SIR H. JENNER FUST.

DECREE.

Here are five lines, interposed between the names of the witnesses, added after the signature of the deceased. In the other cases, nothing more was added than the appointment of the executors, or something that was not dispositive, and the Court held that that might be excluded. But I do not consider the bequest of the gold chain as at all affecting this question. Both witnesses were present during the whole transaction, but one only appears to attest the signature of the deceased until the final conclusion of the paper; and though witnesses, possibly, may subscribe their names wherever they think proper (I give no opinion upon this point), the question is, whether Ann Maria Scott can be said to have meant to attest the signature of the deceased, or the addition. I am not aware of any case that comes near to this; I know no case in which the Court has

* 4 Notes of Ca. 253.

† 3 Curt. 748. 2 Notes of Ca. 350.

‡ 2 Curt. 342.

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*Topham, dec.*Motion re-
jected.

held this to be a sufficient attestation. It may possibly be so; but I should like to have the question argued; I cannot dispose of it by granting administration with the will on Motion. I think it possible that the paper may be sustained, but I should like to hear the point argued. I reject the Motion, and leave the parties to propound the paper.

Fielder, Proctor.

A will, having been attested and subscribed with a cross by the executors (including the widow, who was appointed residuary legatee for life), their appointment *nominatim* as executors being below the signature of the testator, — admitted, with the exception of such appointment, the widow's legacy being thereby void. — A mark affixed by witnesses who can write is a sufficient attestation.

IN THE GOODS OF ROBERT AMISS, DEC. — *Motion, ex parte.* — The deceased died 25th June, 1849, leaving a will, which was prepared by J. H., and copied by his apprentice, on a half-sheet of foolscap paper, as far as the name of the deceased, which was written in the manner of a signature on the second side. The will bequeathed the whole property to the widow for life, and, after her death, to the children of their son, John Amiss. The writing, as copied, was brought down to near the end of the second side, concluding thus :—

And in case the one or the other of the said executors should die, it shall be in their power to appoint any person they may think proper to carry into execution the aforesaid will and testimony [*sic*] of

Robert Amiss.

On the 18th June, J. H., by the deceased's direction, previous to execution, and in the presence of Thos. Beard and Mrs. Amiss, wrote the following addition, under which the deceased placed his signature, and J. H. subscribed his name as witnessing it; Thos. Beard and Mrs. Amiss also witnessed it, by making a cross opposite to their names, written by J. H. against the words "executor" and "executrix," making their marks, instead of writing their names, for want of space, and on account of their names having been already written. This addition appeared, therefore, as follows :—

I hereby bequeath *one hundred pounds* [erased, and "Fifty pounds" superscribed] to my son John Amiss, to be given to him

after the sale, previous to the property being disbursed as above, and Fifty pounds 12 months after.

Nov. 8.

Amiss, dec.

{ My signature
Robt. Amiss
Executor Thomas Beard x
Executrix Louisa Amiss x

Witness John Howarth

This writing (in which the executors were first named) was brought quite to the end and edge of the paper.

Dr. Robinson moved for probate to Thomas Beard and *MOTION.* Louisa Amiss, the executors, except that part under the signature (in the addition) appointing them executors; citing *Re Howell*.*

SIR H. JENNER FURT.

DECREE.

I am inclined to hold that this is a due execution, except as to the appointment of executors. The marks affixed by Thomas Beard and Louisa Amiss, though on the face of the paper it does not appear what for, according to the affidavit, were placed there as attesting the execution of the will; and the Court has held that the making a cross is sufficient for attestation, and I hold this to be a sufficient attestation. Unfortunately, thereby, the legacy to Mrs. Amiss is void. I would decree probate of the will,—but to whom? Not to the executors, as they are witnesses. It is an unfortunate case altogether. Decree administration with the will annexed to Mrs. Amiss.

Administration with the will.

Slade, Proctor.

BASKCOMB v. HARRISON.—*Act on Petition.*—This was a business of proving the will with two codicils of Mr. Henry Baskcomb, by Mr. G. H. Baskcomb, his only son, and sole executor named in the first codicil, against Mrs. Harrison, the deceased's only daughter. The Proctor for the executor having exhibited his party's Affidavit as to Scripts, with certain Scripts annexed, marked A, B, C, D, and E, against whom the sole executor sought to prove the will and two codicils of his testator, being assigned to declare whether or

* 2 Curt. 342.

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not she opposed the scripts, "or any or either, and which, if any," declared that she opposed one (the second codicil), on the face of which she had no interest to oppose: — Held, on a suggestion that other intermediate papers had been executed by the testator, that she had thereby a possible interest sufficient to entitle her to oppose the second codicil; but that she must declare whether she opposed the will and first codicil. — A next of kin cannot, *qua* next of kin, oppose a paper, without showing some interest, however small.

the adverse Proctor (who likewise exhibited his party's Affidavit as to Scripts) was assigned to declare whether he would oppose or not the Scripts A, B, and C, or any or either, and which, if any; whereupon he declared that he opposed the Script C (being the second or last codicil), as being a pretended codicil to the will, and the Proctor for Mr. Baskcomb, objecting thereto, was heard upon his Petition, which alleged that the deceased died 14th April, 1849, leaving a will, dated in 1843, and two codicils, dated respectively in 1845 and 1849; that by his will he named his wife, his son, and J. W. J. D., executors; that by the first codicil he partly revoked such appointment, and named his son sole executor (his wife having died); that also by his will, after ratifying a certain Indenture of Settlement, dated in 1843, made for the benefit of his wife, son, and daughter (Mrs. Harrison), and her issue, he named his wife, his son, and J. W. J. D., universal legatees in trust of his personal estate, and his wife residuary legatee for life, and that he also, after the death of his wife, substituted his son as his sole residuary legatee of the trust funds constituting his residuary estate; that by his first codicil he did not in any way alter the last-mentioned disposition of his property, but merely revoked the appointment of J. W. J. D. as an executor, and appointed his son sole executor; that by the second codicil he made certain bequests to charitable uses and to servants; that, under the Settlement referred to, a sum of £5,000 is settled upon certain trusts for the benefit of his daughter and her issue, and that she has no interest whatever under the will and codicils; that the second codicil does not prejudice or affect her interest in any way whatever in the estate and effects of the deceased, but, on the contrary, is prejudicial to the interest of the son only, and that Mrs. Harrison has no interest whatever at law or in equity, or according to the practice of this Court, to oppose the said codicil, and that she ought not to be permitted to oppose the same. The Answer of the Proctor for Mrs. Harrison submitted that his party had a right to oppose the (pretended) second codicil to the pretended will, and that, whether the same is or is not prejudicial to her interest, it

is for her to determine, and not for the other party to determine for her.

Dr. Harding and *Dr. Bayford*, for the son and executor.—

It is a principle of these Courts, that to support a suit you must show an interest. Want of interest may be objected at any time in a cause. *Wright v. Rutherford*.* The interest must be an interest under the instrument opposed.

Kipping v. Ash.†

Dr. Addams, for Mrs. Harrison.—The interest of my party has been admitted as one of the next of kin, and as such she has a right to oppose any instrument whatever: a party not next of kin must show an interest. [PER CURIAM.—Upon what principle has a next of kin a right to oppose one paper in which she has no interest?] In her Affidavit of Scripts she says there were intermediate wills. [PER CURIAM.—That would show an apparent interest.]

SIR H. JENNER FUST.

JUDGMENT.

I cannot accede to the proposition, that a next of kin has a right to oppose any paper, though she has no interest; she must show some interest, however small. The question is, whether in this case there is sufficient ground for supposing she has a possible interest.

The papers before the Court are a will of 1843, and two codicils of 1845 and 1849. By the will, the whole interest of the daughter is disposed of. The first codicil revokes the appointment of one of the executors, and makes the son sole executor. I should be very much inclined to hold that the daughter had no interest to oppose the second codicil, unless she had ground to oppose the will. But it is now suggested that the testator, during the year 1848, executed another will or codicil, and in 1849 a further codicil. Now this further codicil may have given her an interest, and therefore she has a right to know what the contents of the papers are, and the question as to the revival of the will and first codicil depends upon the validity of the second codicil; and I think this may be a ground of interest. But

* 2 Lee, 286.

† 1 Robert. 270. 4 Notes of Ca. 177.

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ARGUMENT.

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 ———
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Petition over-
 ruled.

I am not prepared to hold, when a party is assigned to declare whether she opposes the will and codicils, any or either, that she is entitled to say, "I oppose the second codicil," and say nothing of the others. I think she should say something as to the other papers. But I think I am not at liberty to exclude the daughter from opposing the second codicil. I cannot go so far as to exclude her from her right to appear, but I think she should declare whether she opposes the will and first codicil. [*Addams.*—I have no objection on her part to say that she opposes all the papers.] I overrule the objection as to her want of interest, and I assign her to declare whether she opposes the other papers.
 (Petition overruled.)

Proctors:—*Lockner*, for the son and executor; *Cherrill*, for the daughter.

2nd Sess.

NOVEMBER 17.

Whereas testator, seized with the cholera morbus, and in *extremis*, had, in giving instructions for his will, described a legatee by a wrong christened name (the person described having been long dead), and, though he discovered the mistake on the prepared will being read over, in the hurry of execution the alteration was not made,—the Court, notwithstanding the consent of the residuary legatee and devisee, refused to alter the will.

IN THE GOODS OF GEORGE COLLINS, DEC. — *Motion, ex-parte.*—The deceased died 12th September, 1849, leaving a will, dated the day preceding. This will was prepared in great haste, under the following circumstances. On the 11th September, being then ill of cholera, he sent for Mr. G., his solicitor, to make his will. Mr. G. was just setting off upon a journey, but being informed that the deceased was to all appearance dying, he went immediately to him and took his instructions, which (fearing that the deceased might not live until a formal will could be prepared) he got regularly executed, and then went to his office and prepared the will, with which he again attended the deceased. Upon reading it over to him, the deceased, referring to a bequest to one of his nephews, said, "I beg your pardon; I made a mistake this morning when I told you 'John'; I meant my nephew William; John has been dead some years ago." Mr. G. said he would make the alteration when he had finished reading the will, and ascertained that it was correct in other respects. During this time, a change had taken place in the deceased, which made the room almost insupportable,

and Mr. G. went down stairs to make the necessary alteration; but, whilst he was looking for a pen, the medical man called to him from the top of the stairs to come up at once, as the deceased, he thought, was dying. Mr. G. immediately went up, and the will was then executed (the instructions being destroyed), the intended alteration being apparently in the hurry forgotten. The deceased rallied a little, but died on the following morning. He left no nephew of the name of "John." The executors were anxious to carry out the intention of the testator, and the residuary legatee and devisee had executed a proxy of consent to the substitution of the name "William" for "John." The personal property was under £6,000.

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Collins, dec.

Dr. Waddilove moved for probate with the name "William" substituted for "John;" the affidavit of Mr. G. being likewise registered. The first question is, whether parol evidence can be admitted to explain the error; if so, secondly, whether the evidence will justify the Court in making the alteration. Mr. Wigram,* as to latent ambiguities, says, "Every claimant under a will has a right to require that a Court of Construction shall place itself in the situation of the testator, the meaning of whose language it is called upon to declare." [PER CURIAM.—Does that give this Court a power to alter a will; to strike out "John" and insert "William?"] In *Lord Camoys v. Blundell*,† the Court (the House of Lords) altered the will, and in *Re Shuttleworth*,‡ this Court rectified an error in a name. [PER CURIAM.—But I did not alter the will.]

DECEASED.

SIR H. JENNER FUST.

The Motion calls upon the Court to alter the will, by inserting "William" instead of "John." This is a novel Motion, for the Court to be called upon to alter a will, by substituting one name for another, though it may be satisfactorily proved what was the intention of the deceased. I am not aware of any authority for this Court's altering a

* On Adm. of Extrinsic Ev., p. 76.

† 1 Cl. & Finn. Ho. Lords Ca., 786.

‡ 1 Cart. 911.

Nov. 17. will; and even if it did alter the will, without witnesses the alterations would not be effectual under the Act. In the case of *Shuttleworth*, a person was described as executor by a wrong name, and the Court, with the consent of parties, decreed probate to that person under his right name; but it did not alter the will. I am not aware of any such case since the passing of the Act. In one case, the Court expressed a determination not to do so. I reject the Motion, and decree probate of the will as it stands.

Motion rejected.

Nicholson, Proctor.

High Court of Admiralty.

3rd Sess.

NOVEMBER 23.

Collision. — **THE "ROB ROY" (KNOWLES).**—*Cause, by Plea and Proof.*—This was a cause of damage by the owners of the steam-ship *Unicorn* and the owners of the cargo laden thereon, against the steam-ship *Rob Roy*; to recover for the total loss of the former vessel and her cargo, in consequence of a collision between the vessels in the North Sea.

The Libel pleaded that, at 5 A.M. of the 21st January, 1849, the *Unicorn*, of 289 tons, with merchandise and passengers, left Hull for Antwerp; that her Majesty's steam-ships and all other steamers navigating the coasts and channels of this country have, for some time past, used or carried (when any) lights of the following description: a bright white light at the foremast head, a green light on the starboard bow, and a red light on the port bow, such coloured lights being fitted each with a screen of wood or canvas on the inboard side, in order to prevent both from being seen at the same moment from any direction but that of right ahead, and that all steamers, when actually using or carrying such lights, have been, or ought to have been, navigated accordingly; that directions

Where two steamers, A and B, were coming on opposite courses, in a dark night, each being provided with the lights directed by the Admiralty, as guides to the movements of such vessels, with relation to each other, at night; one of the lights of A having been accidentally extinguished shortly before the collision, and B having ported her helm, according to the ordinary rules

to that effect were in fact issued by the Lords Commissioners of the Admiralty* prior to January, 1848, and were republished for the information and observance of all steam and other vessels by the Corporation of the Trinity House of the Port of Kingston-upon-Hull, to which port both these vessels belonged, each of which was furnished with lights of the said description, and both were carrying such lights (save that the *Unicorn's* green light was extinguished just prior to the collision) at the time of the collision, and that the navigation of each vessel at such time ought to have been regulated by the lights which each (with the exception aforesaid) of the steamers was so carrying at that time; that the *Unicorn*, in prosecution of her voyage, at 4 P.M. of the 21st January, a strong gale blowing from the S.W. by W., passed the Newarp light-ship, meeting a heavy sea and shipping much water; that the ship's lights, having been trimmed at 4.30 P.M., so as to last till midnight (the usual time for re-trimming them), were exhibited, namely, a bright light on the foremast head, a green light on the starboard paddle-box, and a red light on the port paddle-box; that at 10.45 P.M., the wind still blowing strong from S.W. by W., with a heavy sea, the sky dark, but the horizon clear, the *Unicorn* was about 50 miles S. by E. $\frac{1}{2}$ E. from the Newarp light-ship, a proper look-out being kept on board, when a bright light was observed by the two seamen stationed upon the bridge on the starboard bow, who immediately sung out "a light on the starboard bow," whereupon the master, perceiving the light between the starboard paddle-box and the head of the *Unicorn*, ordered the helm to be starboarded a little, which was done, and he continued, with the look-out men, to watch

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of navigation, instead of star-boarding, as bound to do, under the special directions, had A's light been burning, whereas A star-boarded, in obedience to these directions: — Held, that B did right, and was not liable for the damage, it being the duty of both, under such circumstances, to put the helm to port.

* The Instructions issued by the Lords of the Admiralty, headed "Lights for Steamers," direct that, when under weigh, the vessels are to have "a bright white light on the foremast head; a green light on the starboard bow; a red light on the port bow; to be fitted with inboard screens:" when at anchor, "a common bright light." The Instructions are accompanied by Diagrams, to illustrate the working of the plan, showing six "situations" in which steamers may be placed with relation to each other, and what lights will in such cases be mutually visible.

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the light, which became broader on the starboard bow; that the master called out "steady," the ship's head being S.S.E., and he then took the bearing of the light, which was S., it being then visible to the master, standing near the wheel outside the starboard paddle-box; that about ten minutes after the light had at first been seen, a green light became visible below and on the left of the bright light, and broad on the *Unicorn's* starboard bow, whereupon the master concluded that the vessel was a steamer, and was passing to starboard; that at such time the green light on the *Unicorn's* starboard paddle-box was burning brightly, and continued to do so for some minutes afterwards, and must have been visible to those on board the *Rob Roy*, if keeping a good look-out; that, immediately on seeing the green light on board the *Rob Roy*, the master of the *Unicorn* again ordered that vessel's helm to be starboarded, which order was instantly obeyed, and the vessel answered her helm; that at such time the *Rob Roy* was well to starboard of the *Unicorn*, and the smoke from her funnel was blowing across the *Unicorn's* bow; that a heavy sea just at this time broke over the *Unicorn*, and extinguished her paddle-box green light; that the white light, however, continued to burn brightly on her foremast head, and that the *Unicorn's* red light neither at such time nor at any other time was visible to those on board the *Rob Roy*, by reason of the screen on the inboard side; that, shortly afterwards, the *Rob Roy* suddenly ported her helm, as was apparent from her green light disappearing and her red light becoming visible; that the two vessels were then near each other, and the master of the *Unicorn*, seeing that a collision was inevitable, instantly ordered the helm to be put (and it instantly was put) hard a-starboard, but that, notwithstanding, the *Rob Roy* with her stem almost immediately afterwards struck the *Unicorn* a violent blow abaft her starboard paddle-box, and, rebounding, a second time struck her on the starboard quarter, shortly after which the *Unicorn* sank with her cargo, the crew and passengers being saved on board the *Rob Roy*; that the collision was imputable solely to those on board the *Rob Roy* having so put her helm a-port, and that the loss

sustained by the owners of the *Unicorn* and her cargo was to the amount of £24,000.

The Responsive Allegation pleaded, that the *Rob Roy*, of 354 tons, on the 21st January, had left Antwerp with cargo for Hull, fitted with and exhibiting throughout the voyage a bright white light, of extra strength (having two separate burners, and being visible at from four to five miles distance), at the foremast head, a green light in front of the starboard paddle-box, and a red light in front of the port paddle-box, both fitted with inboard screens, and visible for two or three miles; that at 10.30 P.M., the ship was pursuing her direct course towards the Newarp light-ship (off the English coast), N. by W. $\frac{1}{2}$ W., the wind blowing a stiff breeze from the S.W., and the sea getting heavier, a good look-out being kept, when the man stationed on the bridge between the paddle-boxes saw, at the distance of about three miles, a single bright white light right a-head, and immediately reported it to the mate, then standing on the poop, who thereupon gave orders to port the helm, which was directly done; that the master, hearing the light reported and the order to port the helm, came on deck, and, the white light being then on the larboard bow of the *Rob Roy*, apparently about a mile and a half distant, ordered the helm to be kept a-port, which was done; that the strange light was thereupon brought to bear right abaft the *Rob Roy's* larboard paddle-box, and was seen betwixt such paddle-box and the main rigging by those standing near the wheel, whereupon the helm was steadied, and the strange light was kept constantly in view, and did not alter its bearing; that in a few minutes the strange light appeared to near the *Rob Roy* very rapidly and more a-head, and the helm of the *Rob Roy* was thereupon put hard a-port, when the vessel was discovered to be a steamer and close to them; that the engines of the *Rob Roy* were immediately stopped and reversed, but she nevertheless struck the *Unicorn* very violently, and from the effect of the blow she sank a few hours afterwards; that the bright white or mast-head light of the *Unicorn*, when first seen from the *Rob Roy*, was a very faint one, and during no part of the time between its

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discovery and the collision (ten minutes) was any green light exhibited by the *Unicorn*, nor was any other light visible in her from the *Rob Roy* save the bright light; that it was impossible for the master or crew of the *Rob Roy* to ascertain either what description of vessel carried the light, or what course she was taking, and that the course adopted by the *Rob Roy*, of porting her helm, under the circumstances, was in strict conformity with the Act 9 & 10 Vict. c. 100, as also with the established rules of navigation; and that the collision was attributable to the neglect of those on board the *Unicorn*, in not exhibiting proper lights, in starboarding her helm instead of porting, on first observing the *Rob Roy*, and in not having stopped or eased her engines, or taken any precaution to avoid the collision, after seeing the lights and ascertaining the course of the *Rob Roy*.

The Court was assisted by two Elder Brethren of the Trinity House.*

The Counsel for the party proceeding (*Drs. Addams, R. Phillimore, and Twiss*) were alone heard.

JUDGMENT.

DR. LUSHINGTON.

We are decidedly of opinion that the main point in this case has not been made out by the plaintiff.

The first question,—a question which must be disposed of before all others,—is, whether those on board the *Rob Roy* were guilty of any misconduct, negligence, or want of seamanship, which led to this most unfortunate collision; and if that question be decided in the affirmative, then it becomes wholly unnecessary to enter into any further investigation as to the conduct of those on board the *Unicorn*.

I think it my duty to refer, in the first instance, to the Instructions issued by the Lords of the Admiralty, and which have been republished by the Trinity Board, at Hull; because in the Libel reference is made to these Instructions, and it is alleged and argued that the two vessels were in the 4th situation pointed out in that paper, and consequently the *Rob Roy* was bound to follow the directions given for that

* Captain Wellbanke and Captain Pixley.

situation. It is perfectly obvious that the whole of these Instructions refer to vessels meeting by night, and not by day, and it is equally obvious that the directions are given to steamers, which are required to carry "a bright white light on the foremast head, a green light on the starboard bow, and a red light on the port bow, to be fitted with in-board screens," for this obvious purpose, that steamers meeting each other at night may be apprized of the bearing of one vessel towards the other. To illustrate the directions given for the several situations, diagrams are chalked out in this document; but it is to the 4th only I need advert. The 4th situation represents two steam-vessels coming in opposite directions, in which situation the green light in both is visible to each. The words are these: "4th Situation; Here a *green* light only will be visible to each & the screens preventing the *red* lights being seen. They are, therefore, passing to *starboard*, and will *starboard* their helms with confidence." And why? for the reason stated, that "a green light only will be visible to each;" and "therefore" they "will *starboard* their helms with confidence." Now, assuming that, from any accident, misfortune, or neglect, the green light is not visible to each,—and, on the present occasion, the extinction of one of the green lights rendered it impossible,—then this rule and regulation is utterly inapplicable to the case.

To the circumstances of the case I will briefly advert. Here are two vessels coming nearly in directly opposite courses, one from Hull to Antwerp, the other from Antwerp to Hull; the course of the one being S.E. and by E. $\frac{1}{2}$ E., and that of the other N. and by W. $\frac{1}{2}$ W. The two vessels were, therefore, coming on opposite courses, and laying out of consideration entirely the Regulations to which I have adverted, let us see whether or not the *Rob Roy* was justified in porting her helm; whether she did it in time; whether anything was neglected by her; and whether, in stopping and reversing her engines, she was right, and did it with due expedition. It was contended by Dr. Twiss, —who coped with the real difficulties of the case as far as it was possible for him to do,—first, that those on board the

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Rob Roy, notwithstanding the extinction of the green light, might have concluded without doubt that the vessel was a steamer in due time, and might have starboarded her helm, as it were, in a sort of compliance with the Regulations. Now this is a matter of fact, in which I do not agree with him, and I believe the gentlemen by whom I am assisted have formed the same opinion. It must be recollected that no light was visible to the *Rob Roy* but the white light; and though it is true that the white light at the mast-head of a steamer may differ from the lights carried by sailing vessels, it must be recollected that those on board the *Rob Roy* saw no other light whatever; and if they did see no other light, they might naturally come to the conclusion that it was not the light of a steamer. Therefore, the vessels coming in courses directly contrary to each other, nearly end on, the *Rob Roy* ports her helm; and I apprehend it is a general rule of navigation, applicable to this and other cases, that if there is any question of doubt, the safe and proper course is to port the helm. Therefore, I am of opinion that porting the helm was a proper measure. That there was any delay in porting the helm, I see no evidence whatever; on the contrary, when I read Bartlet's evidence on the 3rd, 4th, and 5th articles, I find he says that, on the discovery of the light, orders were given him by the mate to port, and he kept the helm to port for a short time,—not meaning that it ever ceased to be to port; and on the 5th article he says, directly afterwards the master came up, and directed him to port the helm, which he did, and afterwards the master directed him to put it hard a-port, and he did so. I see no reason to suppose that there was the slightest delay. Looking at all the circumstances and difficulties of the case,—for the witnesses cannot speak with strict accuracy as to distance and time,—although all parties, I believe, speak to the best of their knowledge and belief, and without any wish to mislead the Court, I think it would be impossible to fix with any legal or moral certainty what was the distance at which the vessels saw each other, or what was the interval of time which elapsed after that before they came into contact. We know from experience how difficult it is to fix

this, when, as it appears, the vessels were going through the water at a very considerable rate.

There is another consideration which was much pressed in argument, and therefore I advert to it, though I do not see its bearing upon the question. It is said, that, immediately after the discovery of the light in the *Unicorn* on board the *Rob Roy*, the mate gave orders to take in the mainsail. It is impossible to see the bearing of this. The mate was watching the approach of the vessel; there was the helmsman to obey his orders as to the direction of the vessel, and the engineers ready to stop and reverse the engines. Whether the men were employed in taking in the mainsail or not does not appear to me to affect the merits of the case.

The only other point is, whether the engines were stopped and reversed in time. Looking at the whole of the case, I consider that that is a charge of mismanagement which is not substantiated by the evidence at all. I think that those on board the *Rob Roy* did resort to everything that was necessary to be done, and in due time.

This being so, I am relieved from the necessity of entering into a consideration of the conduct of those on board the *Unicorn*. It is far from my desire to add to the suffering already inflicted by attributing to them more than misfortune. They had the misfortune to have their green light extinguished, and in consequence there was not that warning given to the other party which ought to have been given. But those on board the *Unicorn* acted as if such notice had been given, and the master was in ignorance whether the green light was burning or not, and gave directions to starboard the helm, and the collision took place. I do not wish to attribute blame, but I must make one observation: if these Regulations of the Admiralty are to be followed out, and vessels are to be guided by them, it is of the last importance that those on board steamers should see that the three lights are burning, for it is perfectly clear that, unless this precaution is taken, and the three lights are kept burning, other misfortunes of this nature will most probably occur.

For these reasons, the Court, with these gentlemen, is

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Rob Roy.

The *Rob Roy*
did right.

Necessity of
keeping the
lights burning.

Nov. 23. entirely of opinion that the collision arose without any blame
Rob Roy. imputable to the *Rob Roy*.

CAPTAIN WELLBANKE.—We are satisfied that the vessels were nearly right a-head when they first saw each other, and that both should have put their helms to port.

Rob Roy dismissed. PER CURIAM.—I dismiss the *Rob Roy*.

Proctors :—*F. Clarkson*, for the *Unicorn*; *Jennings*, for the *Rob Roy*.

Prerogative Court of Canterbury.

3rd Sess.

NOVEMBER 27.

A will signed IN THE GOODS OF AMY BATTEN, SPINSTER, DEC.—
 by the testatrix *Motion, ex-parte.*—The party deceased died 2nd November,
 at the end of 1849, leaving a small property. She made a will, which
 the attestation- clause, admitted to probate begins, "In the year of our Lord one thousand eight hun-
 as duly exe- dred and forty-eight, I, Amy Batten, &c., make this my last
 cuted. — Rule will, leaving," &c.; and the first side or page (of letter-
 as to the affi- paper) ends thus:—
 davits of wit-
 nesses.

In witness whereof I the said Amy Batten the Testatrix have to this my last Will and Testament set my hand and seal this day the sixth of October one thousand eight hundred and forty eight

Signed in the presence of us who at the request and in the presence of the said Amy Batten Testatrix and—

Here ends the writing on the first page; the second page is blank; at the top of the third page the attestation-clause is continued, thus:—

of each other have hereunto subscribed our names as Witnesses
 Amy Batten

{ Witness Elizabeth Fletcher
 Rebecca Smith

Motion. *Dr. Bayford* moved for probate to the executor.

SIR H. JENNER FUST.

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Batten, dec.

DECEASED.

The question arises as to the due execution of this will, namely, whether or not it is signed "at the foot or end thereof." It is one of that class of cases most distressing to the Court, which is forced to reject Motions for probate of instruments which have been signed not, perhaps, precisely and strictly, according to the requisitions of the Act of Parliament, at the foot or bottom or end of the will. But I think there is a very material distinction between this case and that of *Smee v. Bryer*.^{*} This paper ends, on the first side,—after the appointment of the residuary legatee,—“In witness whereof I, the said Amy Batten, the Testatrix, have to this my last will and testament set my hand and seal this day, the sixth of October, one thousand eight hundred and forty-eight,”—and then there is a very small space, not room for the signature of the deceased, at the end of that line, and immediately following that is the attestation-clause, “Signed in the presence of us, who, at the request and in the presence of the said Amy Batten, Testatrix, and”—this is brought quite close to the end of that side of the paper by a line following the word “and ;” the second side is left blank, and on the third is a continuation of the attestation-clause, and the signature, “Amy Batten,” is immediately below the attestation-clause, and then follow the signatures of the two attesting witnesses.

This appears to me to be one of those cases in which the attestation-clause forms part of the will, for it is carried on immediately from the close of the *testimonium*-clause, where, generally speaking, the signature should be placed. But where the attestation-clause follows, as it does in this case, after the *testimonium*-clause, without a blank, it appears to me that it would be carrying the rule too far to apply it to a case of this description, where the testatrix never could have intended to add more to the will. The second side being left blank is nothing, because the third side is continued from the first. Under these circumstances, I am of opinion that the paper is entitled to probate.

Probate
decreed.^{*} 6 Notes of Ca. Supp. xli.

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Batten, dec.
 Affidavits.

In this case, only one of the witnesses has made an affidavit. I thought, and still think, so far as my opinion goes, that both witnesses should join in making the affidavit; but I am informed that great delay and inconvenience will take place if that rule is strictly insisted upon. I therefore think, with reference to that representation, where the mere fact of execution in the presence of two witnesses is concerned, that the affidavit of one must be received. I find, upon inquiry, that such has hitherto been the rule acted upon in the Registry. I find this confirmed by what is stated in the last edition of Mr. Justice Williams' work on the *Law of Executors and Administrators*. It seems to be considered that, where there is a defect in the attestation-clause, the evidence of one witness is required. But I must still insist upon this, that where an affidavit is necessary to account for alterations, and where two witnesses are required to make an affidavit, and these join in one affidavit, both shall depose to the execution,—that is, that the will was signed or the signature acknowledged in their joint presence. I speak of this in reference to what took place on a former Court-day, where two witnesses joined in the affidavit, but only one deposed to the execution of the will. Where the two are to be produced, I cannot understand why both should not join in the affidavit as to the due execution of the will. Where only one states this, it leads to a surmise that they could not both depose to the fact. Therefore, where two witnesses are sworn as to alterations in a will, they must both join in the affidavit as to the due execution of the will.

Burchett, Proctor.

A holograph will, signed, not immediately at the conclusion of the will, where there was sufficient

IN THE GOODS OF ELIZABETH MARY MAYO WHITTLE, OTHERWISE ELIZABETH WHITTLE, SPINSTER, DEC.—*Motion, ex-parte*.—The testatrix, who died 9th October, 1849, on the 2nd May preceding, produced her will, in her own handwriting, with the attestation-clause already written,

to Sarah Agnes Campbell and Susanna Cornwall (the subscribed witnesses), and thereupon signed her name beneath such clause of attestation in their presence, and they immediately thereafter attested and subscribed the paper in the presence of the deceased and of each other. The will is written on the first side of a sheet of letter-paper, used lengthwise, beginning, "I Elizabeth Mary Mayo Whittle," and ending, "to this my last will and testament I have set my hand and seal this 2nd day of May in the year of our Lord 1849." Then follows, after a small blank space, of about a line's width, affording sufficient room for the signature, the attestation-clause, "Signed, sealed, published, and declared by the said testatrix, Elizabeth Mary Mayo Whittle, as her last will and testament, in the presence of us, who, at her request, and in her presence, and in the presence of each other, subscribe our names as witnesses hereto." Immediately below the conclusion of this clause, and close to it, is the signature of the testatrix, and immediately beneath her signature are the subscriptions of the two witnesses.

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space for the signature, but at the foot of the attestation-clause, —admitted to probate.

Dr. Jenner moved for probate, referring to the preceding MOTION. case.

SIR H. JENNER FUST.

DECREE.

I protest I do not know to what extent the Judicial Committee of the Privy Council would consider the signature in this case as being at the foot or end of the will, under the Act. It differs from the case of *Smee v. Bryer** very materially. Here is a sufficient space for the deceased to have signed her name after the *testimonium*-clause, but she signs under the attestation-clause; and the question is, whether the Court is to construe the Act of Parliament so strictly as to say that the signature in this case is not at the foot or end of the will. I am afraid I should be obliged to set aside all wills if I were to say it was not so. The difficulty in all these cases is to know how much space may be left. According to Mr. Justice Williams,† it is a reasonable

* 6 Notes of Ca. Supp. xli.

† Law of Exec. (4th Ed.) 1 vol. p. 68.

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space. I want to know the principle upon which the Court is to act. In the case of *Smee v. Bryer*, the Superior Court said there was "no part of the will immediately above" the signature of the testatrix: here there is. I am inclined to hold that this is a good execution. I do not exactly understand on what principle the Court is to act, if it be not the principle of common sense,—and I cannot say that, according to the principle of common sense, this signature is not at the foot or end of the will. Where there is a large space left, the Court would hold that the signature is not at the foot or end; but where, as in this case, there is but a small space, I think I should not act up to the spirit of the Statute if I did not hold it to be a good signature at the foot or end. I am afraid I should make many wills drawn up in solicitors' offices void if I were to pronounce against this. [*Dr. Addams*.—When an Act of Parliament requires that the signature should be at the foot or end of the will, people think it must be the last thing of all.] I decree probate of this paper to pass, and I must endeavour to find some principle. [*Jenner*.—The Act of Parliament itself seems irreconcilable with common sense, if it does not allow any space between the end of the will and the signature, and yet in the body of the will any space may be left.] I cannot lay down any precise rule; but in the present case, I consider there has been a sufficient compliance with the Act of Parliament, there being no unreasonable space left.

Motion
 granted.

Fielder, Proctor.

A feme covert,
 having a power
 of appointment
 by settlement
 at her marriage,
 on the death
 of her husband,
 makes her will;
 then marries
 again without
 settlement, and
 afterwards exe-
 cutes a paper

IN THE GOODS OF THE RIGHT HONOURABLE EMILY MADELINA MONTAGU, COMMONLY CALLED LADY EMILY MADELINA MONTAGU, DEC.—*Motion, ex-parte*.—The deceased died in November, 1848. By settlement, in 1830, on the then intended marriage of Lord William Francis Montagu with the now deceased, then Emily Madelina Du Pré, certain sums of money became vested in three trustees, upon certain trusts, therein mentioned, for the benefit of any issue of the marriage, with a joint power of

appointment during the life of both the parties, as they should direct, and failing such joint appointment, then as the survivor of them by deed or will should direct or appoint, and in default of such direction, for all the children equally. In 1834, Lord William executed his will, whereby he bequeathed all his property to his wife absolutely, appointing her sole executrix. In 1838 he acquired considerable property, through his aunt, and in March, 1842, he executed a codicil, referring generally to his property acquired since the date of his will, and then proceeded to appoint his wife and others trustees and guardians of his children. His Lordship having died without executing any other paper, his widow, sole executrix, proved his will in November, 1842. In December, 1842, Lady Emily (the deceased) made her will in general terms, and appointed, so far as she lawfully could, Viscount Mandeville guardian of her children, and Messrs. Grenfell and Labouchere executors. This will was deposited by the deceased at her bankers, Messrs. Coutts and Co., where it remained until December, 1848, when it was delivered up to the executors. The issue of the marriage were still minors. In December, 1844, the deceased married Dr. Evanston, and no settlement was made on this occasion. On the 4th March, 1845, whilst at Cadiz, she executed a paper, which concludes thus: "And I hereby annul all former will, testament, or codicils that I may have made." On the 9th October, 1847, she executed another paper, in which she refers to her will as being at Messrs. Coutts', stating that it was written before her marriage with Dr. Evanston, and that great part of her money must go as therein directed. Dr. Evanston, the husband of the deceased, by proxy, consented to administration with the will annexed of all or any of the papers being granted to Messrs. Grenfell and Labouchere, the executors named in the will of 1842.

Dr. Addams moved for administration with all the papers *MOTION* annexed.

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Montagu, dec.

annulling former wills, and subsequently another paper, which refers to her will executed before her second marriage, and states that great part of her money must go as therein directed:—Administration decreed with the three papers annexed, as together containing the will.

SIR H. JENNER FUST.

DECREED.

The papers are to form together the will and

Nov. 27. *Montagu, dec.* codicils of the deceased. Decree administration of the three papers. There must be an affidavit of the due execution of the intermediate paper, made at Cadiz.

Longden, Proctor.

Signature of the deceased not at the foot or end of the will.

HOLBECH v. HOLBECH.—*Allegation*.—This was an Allegation propounding the will of Mr. Hugh Holbech, who died in June, 1849, by the widow and universal legatee, against the father of the deceased. The will is in the handwriting of the deceased, and is written on two sides of a sheet of note-paper, the second side ending with the *testimonium* and attestation clauses, which fill that side to the bottom, there being scarcely room for a signature. Beyond the fold of the paper, a circumflex is drawn on the third side, opposite to the *testimonium*-clause, and another circumflex opposite to the attestation-clause; on the right hand side of the upper circumflex appears the signature of the deceased (nearly in the centre of the third side), and below it are the subscriptions of the two witnesses, thus:—

In witness thereof I hereunto set my hand and seal this 29th day of April, in the year of our Lord, 1845.

Signed and acknowledged by the testator as and for his last will and testament in our joint presence of each other have subscribed our names as witnesses.

Hugh Holbech

Francis Francis
James Gerrard.

(Seal.)

Aug. 9.

A Motion for probate having been rejected, the paper was propounded by the widow in an Allegation, the admission of which was opposed on the part of the father, the

suit being an amicable one, to obtain the judgment of the Court whether the signature was at the foot or end of the will, within the meaning of the Statute.

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Holbeck v. Holbeck.

Dr. Phillimore, in opposition to the Allegation.—The decision of the Judicial Committee in *Smee v. Bryer** appears to settle this case. It is there laid down that, whatever inconveniences may arise from not giving effect to the intentions of testators, they are more than counterbalanced by the advantage of excluding the risk of giving effect to spurious wills: the principle is, that the general interests of society require the rule to be strictly enforced. This case falls within that of *Smee v. Bryer*, as well as the cases of *Odell*,† of *Hill*, and of others, determined on the First Session of this Term.

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ARGUMENT.

Dr. Haggard, in support of the Allegation.—This will is entirely in the handwriting of the testator; it is made in favour of his wife, and there can be no doubt whatever that it was his intention that it should operate as his will. It may be looked at as if written on half a sheet of letter-paper; the *testimonium* and attestation clauses, being consecutive and following immediately the dispositive part, and there being not space for the testator to sign at the end of the attestation-clause, he places his signature at the side of the *testimonium*-clause, near the conclusion of the will, as in the case of *McCallum*,‡ where the Court admitted the paper to probate.

SIR H. JENNER FUST.

JUDGMENT.

I think the principle to be applied to this case is very much determined by that of *Smee v. Bryer*; for although there is scarcely room for the signature on the second side, there is a considerable space left at the top of the third side, above the signature. I cannot consider the circumflex as very material. In the case of *McCallum*, the signature was not exactly at the foot or end, but it was in the margin, at the conclusion of the will. In that case I had considerable doubt; but in this case the signature has no immediate con-

* 6 Notes of Ca. Supp. xli.

† *Antea*, p. 267.‡ *Antea*, p. 125.

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Holbeck v.
Holbeck.
 Allegation
 rejected.

nection with the will. Adhering, therefore, to the principle laid down in *Smee v. Bryer*, I am of opinion that the signature is not at the foot or end of the will, within the meaning of the Statute, and consequently I reject the Allegation.

Proctors: *W. Townsend*, for the widow propounding; *Morgan*, for the party opposing.

Add. Court Day.

DECEMBER 1.

An objection by an executor to probate of the will of his testatrix being decreed to his co-executor, praying probate, on the ground of his incapacity, — not sustained.

EVANS v. TYLER.—*Petition.*—This was a business of granting probate of the will, with a codicil, of Mrs. Jane Tyler, of Coity Place, Bridge End, in the county of Glamorgan, widow, who died 10th October, 1848, aged 80, leaving behind her one son, Thomas Tyler, and one daughter, Jane Mary Evans, wife of Morgan Evans, being possessed of real and personal estate. Probate was prayed by the Rev. Thomas Evans, D.D., one of the executors, to be granted to him, to the exclusion of the other executor, Thomas Tyler (the son of the testatrix), who likewise prayed probate, and an Act on Petition was entered into between them.

The Act, on behalf of Dr. Evans, alleged that Mr. Tyler (his co-executor), then fifty-nine years of age, was always a person of considerable weakness of intellect and incapable of the due management of himself and his affairs, and was so esteemed by the testatrix, whose expressed intention it was, on that very account, to place him in the care and under the protection of Dr. Evans, as in part appeared by a letter (annexed) sent by her to him on the 26th February, 1848, she being then about to make her will; that shortly thereafter she executed a will, which had been prepared by her solicitors, in which, notwithstanding, she in fact appointed her son her sole executor and Dr. Evans sole trustee of her real estate; that subsequently she executed another will (that of which probate was sought), dated 9th September, 1848, wherein her son was in fact also appointed executor with Dr. Evans (and not sole executor), Dr. Evans being also appointed sole trustee of the real estate; that* upon Dr. Evans' hearing of

* Certain allegations, respecting Thos. Evans, the son of Mrs. Evans, the testatrix's daughter; and Rees Jenkins, who married the sister of Thos. Evans; were in this part expunged on reformation of the Act.

the death of the testatrix, from a third party, and also that her son, immediately upon that event, had disappeared from her house, proceeded thither, and found that Thomas Evans, a grandson of the testatrix, and Rees Jenkins, his brother-in-law, had entered into possession of the house and property, and were acting as her legal personal representatives, and notwithstanding the production of the duplicate will by Dr. Evans, they still retained possession of the house and property, and refused to permit Dr. Evans to interfere as executor; that immediately upon the death of the testatrix, Thos. Tyler, having disappeared from the house, was followed and overtaken in the neighbourhood by William Morgan, late a servant of the testatrix (and who had had for some time past the principal care and superintendence of Thos. Tyler), who brought him back to a public house, "*where Dr. Evans found him in such a state of mind as to be quite incapable of taking care of himself, and therefore,*"* he, on the 12th October, proceeded to make arrangements for his removal to Gloucester, where he (Dr. Evans) resided, in proper charge or under proper custody, but, prior to the completion of the arrangements, Thos. Evans caused him to be taken by Wm. Morgan to Swansea, and to be there placed in the charge and under the personal restraint of one George Bowen, who, as well as Thos. Evans, refused to permit any person to have access to him; that on the day immediately following Thos. Tyler's removal to Swansea by Wm. Morgan, as they were walking together by the sea-side, Tyler suddenly attempted the life of Morgan, by stabbing him in the throat with a large clasp-knife, being apparently quite unconscious that he had done any wrong, and Morgan begged the persons on the beach who rescued him "not to hurt the old gentleman, for that he was his keeper," adding, "mind and take care of him, for otherwise he will be sure to drown himself;" and it expressly alleged "*that the said Thos. Tyler was a dangerous lunatic on the said day, and acted as and was treated as such in manner as and by the persons aforesaid.*"*

DEC. 1.

Evans v. Tyler.

The admission of this Act on Petition was opposed.

Feb. 3.

Dr. Harding, for Mr. Tyler, in objection to the Act.— ARGUMENT.

There is no case in which one executor has objected to another as being unfit, raising the question in the shape of an Act on Petition and Affidavits, which must lead to the same inquiry as in a question as to the capacity of a testator. It is

* The words in *italics* were added on reformation of the Act.

DEC. 1. very doubtful whether the Court has jurisdiction to exclude an executor on such a plea as this and affidavits. Mr. Justice Williams says* that, generally speaking, all persons are capable of being executors save those expressly forbidden. It is not alleged that Mr. Tyler is an idiot or imbecile (if he could be excluded on that ground), but that he was always a person of "considerable weakness of intellect,"—a term not known to our law,—“and incapable of the due management of himself and his affairs.” This is a case, therefore, of connate incapacity, not anything supervening, and such a person may still be an executor. He is not represented to be incapable of the management of himself and his affairs, but of their “due” management. Is such an allegation a ground for the exclusion of a man from being an executor, as to which the Court has little latitude? *Rex v. Raines*.† The Court must reject the Petition as containing nothing relevant.

Dr. Addams, in support of the Act.—This man, if the facts stated are true, is a dangerous lunatic. Has the Court ever granted probate of a will to such a person? Does not the Court continually receive proof of such a fact on affidavits? It is true that the Court could not exclude a person from being executor who is labouring under connate weakness of intellect, when appointed by a testator with a knowledge of the fact; but we allege farther that he is *now* a dangerous lunatic; he was in the hands of a keeper, whom he attempted to stab. [*Harding*.—You do not allege him to be a lunatic.] You refuse us access to him.

JUDGMENT**SIR H. JENNER FUST.**

This is a novel proceeding in this Court, to take its opinion as to the relevancy of facts put forward in an Act on Petition against the grant of probate of a will to an executor appointed by that will. All I understand of the case is this: that the Proctor for the Rev. Dr. Evans prays probate of the will and codicil to him, as executor, and a Proctor appears for Mr. Tyler, and alleges him to be the other exe-

* Law of Exec. b. 3, c. 1.

† *Ld. Raym.* 361. 1 *Salk.* 299.

cuter, and prays probate to his party; and I understand that the objection is, that Mr. Tyler is an improper person, at the present moment, to have probate, either solely or joined with Dr. Evans, the other executor. Certainly the executor objecting ought to show grounds sufficient to justify the Court, in law and reason, in rejecting the prayer of the other executor to be joined in the grant of probate; and the question is, whether the grounds are relevant to induce the Court to stay its hand, at least, before it grants probate to Mr. Tyler.

DEC. 1.

Evans v. Tyler.

The facts ought to be stringent in themselves to satisfy the Court that he is incapable of managing himself and his own affairs and the deceased's affairs, and not that he is simply a person of weak mind, and incapable of the due management of his own affairs. The Act on Petition does not allege distinctly the real state of Mr. Tyler, though I collect from what Dr. Addams said, that it is meant to be averred that he is a dangerous lunatic, and that he is a person said to be probably put forward by others to obtain probate of the will for their own purposes. I cannot but say that there is a great deal of irrelevant matter in the Act; suspicions are cast upon the motives of persons; but this is not sufficient to justify the Court in excluding an executor, on such grounds, from the probate of the will. It does not appear that the deceased did consider her son not to be a proper person to be entrusted with the management of the property, for in the letter she wrote to Dr. Evans, in February, 1848 (annexed to the Act), she says: "I take the liberty of addressing you respecting my son: I am about settling my affairs, and find it necessary that I should appoint a trustee to act for him in the case of my death or inability, being now in my eightieth year. He will have a good property, but totally unable to carry on an account." She may have thought it right to appoint him an executor notwithstanding this opinion of her son's incapacity to carry on an account, in his office of executor. "He has been twelve years and a half with your uncle, and is acquainted with you, which induces me to apply to you to take him under your protection. I will appoint a person to receive the rents, and to pay

Dxc. 1. into your hands for his purpose, and paying you all expenses and trouble. Be pleased to reply to this, and not let it go further, for people are watching to take advantage. He is well-disposed and sober, but does not like to take trouble." Now she does seem to regard him as a person who required some degree of superintendence, to prevent advantage being taken of him, and as not able to carry on an account; but it appears to me that nothing is said that would empower the Court to exclude him from the probate; it must go further. Then it is alleged in the Act that, shortly after the date of this letter, she made a will, in which, notwithstanding the premises, she appointed her son sole executor, and Dr. Evans sole trustee of her real estate, and that subsequently she executed another (her last) will, wherein her son is also appointed an executor with Dr. Evans. So that she still considered him a proper person to be entrusted with the property, and in the first instance, to the exclusion of Dr. Evans, he is declared sole executor of the will. The Act goes on to allege certain matters respecting the family of the testatrix, for the purpose of charging them (I presume) with conspiring to induce the Court to grant probate to Mr. Tyler for their own purposes; but I do not know that the Court can on that ground exclude him from the probate of the will. If he is a dangerous lunatic, the fact must be brought before the Court distinctly, as it would have been in a proceeding by Plea and Proof. I admit that, if he is incompetent, the Court would not decree probate to him; it would reserve power to him when he was competent to exercise it; but it must be distinctly alleged and proved before the Court that he is actually disabled by mental incapacity from taking probate of the will and codicil; and there is not sufficient in this Act to satisfy me that he is so. The Court is not at liberty to exclude him on slight grounds; it must be on the strong ground that he is incapable of acting as executor. The testatrix might appoint whom she pleased. It appears to me that all the circumstances alleged in the Act on Petition have scarcely anything to do with the case further than showing the exclusion of Dr. Evans from having access to Mr. Tyler, to

ascertain his real state of mind, which may not only go to show that he is in effect in custody, but may justify the Court in receiving evidence something short of what it would require supposing there was access to him. It is said that he is in the custody of the parties who are in possession of the property. I do not know that this is a ground why the Court should exclude him. At the same time, the Court would be averse to put the property in the possession of a party who is in the custody of other persons. But still the Court cannot exclude him unless it is distinctly alleged that he is incapable of acting, and that does not appear so distinctly alleged as it might be; and I therefore refer the Petition back to have those grounds set out, and to have it distinctly alleged that, in his state of mind, Mr. Tyler is incompetent to act in the trusts of the will. [*Harding*.—What does the Court wish should be alleged?] That he is incompetent to act:—whether lunatic or not I leave for the learned Counsel to decide.

DEC. 1.

*Evans v. Tyler.*Petition to
be reformed.

The Act having been reformed as before shown, the Answer, on the part of Mr. Tyler, alleged as follows:—

It denied that he was or is a person of considerable weakness of intellect, or incapable of the due management of himself or his affairs, or was so esteemed by the testatrix, and alleged that “he always was and still is a person competent to take care of himself, to give rational and proper orders and directions as to his affairs, to understand general business when explained to him, to select those he may choose to employ as his agents, and generally to discharge the ordinary duties of life; that he is a man of good information, fond of reading, and that he converses readily and rationally with his friends and acquaintance on general subjects;” though he is “of shy and retiring habits, somewhat eccentric in manner, and averse to exertion or business, especially to that connected with rents, repairs, and sales of real and mineral property, and inexperienced in the management thereof,” and it was only with reference thereto, and to protecting him from imposition from tenants and agents, that the testatrix recommended him to the protection of Dr. Evans, who has confessed that Mr. Tyler is very sensible; that the testatrix, in 1837, by a will written with her

DEC. 1. own hand, bequeathed to him her whole property for life, with remainder to his issue, or as he should by deed or will appoint, of which will she appointed Dr. Evans executor; that such the real meaning and intention of the testatrix, in her recommendation of her son to Dr. Evans' protection, was manifested as well by the will afterwards prepared for her, as by that of 1848, in both of which she appointed her son executor; that the testatrix, by her last will, bequeathed to her son all her personalty absolutely, and also gave him the rents and profits of her real estate for life, with absolute and uncontrolled powers of appointment over the whole; that this will was prepared by the solicitor of Dr. Evans, whose appointment as executor was first suggested to the testatrix by Dr. Evans himself, who informed her, in a letter (annexed) that he had no objection to act as her executor conjointly with her son; it denied that Thos. Evans or Rees Jenkins acted as alleged, except the latter as the solicitor of Mr. Thos. Tyler, and for his interest and by his instructions, and Thos. Evans as his nephew, and by his instructions and wishes; or that they retained possession of the house and property, except only on behalf and for the interest and by the desire and instructions of Mr. Tyler; but it admitted that they refused, pending this cause, to permit Dr. Evans unopposed to act as executor; that, shortly after the death of the testatrix, Mr. Tyler, having previously delivered everything in the house into the charge of his nephew, Thos. Evans, and his niece, Mrs. Jenkins, left the house, in order to avoid remaining there with the corpse, intending to stay away until after the funeral; that he was followed and attended by Wm. Morgan (who had been his mother's gardener), who had no superintendence over him, and then went to the *Wyndham Arms*, where two persons, acquaintances of Dr. Evans, on the 11th October, visited him, and conversed with him on matters of business relating to his own and his mother's affairs, much to his annoyance, and being irritated at such interference, he sent a message to his nephew, Thos. Evans, informing him thereof, who consulted Rees Jenkins, as his own and Mr. Tyler's solicitor, who went to the inn, and put an end to such interference, by the desire of Mr. Tyler; it alleged that Dr. Evans, accompanied by his solicitor, on the 12th October, saw and conversed with Mr. Tyler, and also with Thos. Evans and Rees Jenkins, and then for the first time informed Mr. Tyler that Dr. Evans was one of the testatrix's executors, of which he was then ignorant, whereupon Dr. Evans and his solicitor were asked to attend the funeral, on the following day, but they declined; that it was thereupon agreed upon between Rees Jenkins, as the

solicitor of Mr. Tyler, and Dr. Evans and his solicitor, that they should meet the day after the funeral (the 14th), and inspect the testatrix's papers and effects in her house; that, notwithstanding this arrangement, Dr. Evans and his solicitor did, on the 13th, whilst Rees Jenkins and Thomas Evans were, as they knew, absent, attempt secretly to gain admission into the house, in order to take exclusive legal possession thereof, in consequence of which, on the following day, when they applied to be admitted, Rees Jenkins refused; that neither Dr. Evans nor his solicitor on that occasion ever denied the right or capacity of Mr. Tyler to act as executor, and on various occasions immediately after his mother's death, Mr. Tyler conversed quite calmly and reasonably about his late mother's and his own affairs; that after the departure of Dr. Evans and his solicitor, the latter wrote a letter (annexed) to the London agent of Rees Jenkins, wherein he admitted Mr. Tyler to be a person capable of acting as executor, and represented that he was acting professionally on his behalf; that on the 15th or 16th October, Dr. Evans directed a medical person to take measures for securing Mr. Tyler and conveying him to Gloucester, even though it might be by compulsion, and against the will and without the knowledge of Thos. Evans, his nephew, or Rees Jenkins, his solicitor, promising that he should be rewarded handsomely for his trouble; this plan, for the intended seizure and removal of Mr. Tyler, being the "arrangements" referred to in the Act; that Mr. Tyler, on learning the contents of this letter, felt and expressed great alarm lest he should be carried off to Gloucester or molested, and he determined to follow Rees Jenkins to Swansea, for the purpose of taking his advice and of avoiding any personal annoyance; that he accordingly proceeded, with Thos. Evans and Wm. Morgan, to Swansea, and consulted Rees Jenkins, taking lodgings there, where he has since remained; that on the morning after his arrival at Swansea, he rose early, and proceeded to walk alone on the sands, followed by Wm. Morgan, who suddenly seized him by the arm; that, fully believing Morgan intended to seize his person and carry him off to Gloucester, in a state of great agitation and alarm, he (Tyler) violently resisted, and a struggle taking place, Morgan grappling with him, in his efforts to release himself, he (Tyler) wounded the servant with a knife, but it denied that he was or now is a lunatic, or dangerous, or that he was treated as such; it alleged that Mr. Tyler has felt and expressed much regret for having so used his knife; that George Bowen was hired to attend upon Mr. Tyler, in the place of Morgan, but has since left his service, and it denied that Mr. Tyler ever was in any man-

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ner under the charge or restraint of Bowen, or that he is under any restraint, being at perfect liberty to go where or to do what he thinks fit, and it alleged that Mr. Tyler, to avoid annoyance, gave repeated and express orders that no stranger should for the present have access to him on business, though he had admitted some persons to see him on business, on his being first informed of its nature.

NOV. 22
ARGUMENT.

The Reply and the Rejoinder counterpleaded or explained certain allegations in the Act and Answer respectively.

Dr. Addams, for *Dr. Evans*, argued for the disqualification of the co-executor, on the ground of his insanity.

Dr. Harding, for *Mr. Tyler*, in support of his title, denied the jurisdiction of the Court, on the grounds stated, to set aside the appointment of an executor.

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JUDGMENT.

SIR H. JENNER FUST.

The ground of opposition to the prayer of *Mr. Tyler* is, that he is a person incompetent to manage himself and his affairs, and therefore to discharge the office of executor. According to the suggestion of Counsel, this is a question *primæ impressionis*; it is said that no such case has ever occurred before in which a party applying for probate of a will, as executor, was objected to as incompetent to discharge the duties of the office, and was on that ground excluded by the Court: the Counsel for *Dr. Evans* has cited no case, and the Counsel on the other side has been able to find no such case reported. It appears to me that, although such a case cannot be produced, and though there may not have been any other precisely similar case, the principle is acknowledged, and has been acted on in various instances, and that the Court has been called upon, where the executor named in the will has been lunatic, to decree, and has decreed, administration with the will annexed to some other person.

Who are competent to be executors.

The first question is, who are competent to be appointed executors? and I apprehend this is correctly laid down by *Mr. Justice Williams*, in his valuable work on the *Law of Executors and Administrators*:* "Generally speaking, all

* 1 vol. (4th Ed.), b. 3, c. 1, p. 186.

persons who are capable of making wills, and some others besides, are capable of being made executors." Infants, he says, may be appointed executors; "but if an infant be appointed *sole* executor, by Statute 38 Geo. 3, c. 87, s. 6, he is altogether disqualified from exercising his office during his minority, and administration, *cum testamento annesso*, shall be granted to the guardian of such infant, or to such other person as the Spiritual Court shall think fit, until such infant shall have attained the age of twenty-one years." Again:* "Idiots and lunatics are incapable of being executors or administrators; for these disabilities render them not only incapable of executing the trust reposed in them, but also, by their insanity and want of understanding, they are incapable of determining whether they will take upon them the execution of the trust or not. Therefore, it has been agreed,"—these are the words the learned Judge makes use of,—“that if an executor become *non compos*, the Spiritual Court may, on account of this natural disability, commit administration to another.” And he refers to the case of *Hill v. Mills*.† Again:‡ “If the executor be disabled from acting,—as if he becomes lunatic, or incapable of legal acts, —then, on the principle of necessity, there shall be a grant of a temporary administration with the will annexed.” Here he speaks of temporary Administrations. He adds: “Where a sole executor or administrator becomes a lunatic, it is the ordinary practice of the Court to make a limited grant to his Committee for his use and benefit during his lunacy.” He goes on: “It is also the practice of the Ecclesiastical Court to grant administration for the use and benefit of a lunatic, though the person alleged to be so has not been found a lunatic by Inquisition. When such a case occurs, the Ecclesiastical Court requires affidavits, stating the fact of lunacy, and that no Inquisition has been had, and, of course, no Committee appointed: the Court then grants administration to the next of kin of the lunatic, for the use and benefit of the lunatic, pending the lunacy, and it requires sureties in double the amount of the property, and

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* P. 195.

† 1 Salk. 36.

‡ B. 5, c. 3, s. 6, p. 428.

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 Evans v. Tyler. for this practice of the Court, to *Ex-parte Evelyn*.^{*} Upon
 the subject of temporary administrations during the incapacity
 of an executor, he refers to Oughton,[†] who terms them
 "*Litteræ Administrationis durante Corporis aut Animi vitio*."
 But, in all these cases, it is within the jurisdiction of this
 Court to ascertain the fact, to be convinced that the disability
 is a legal one; therefore the inquiry must be made in
 this Court. The jurisdiction of this Court is, therefore, beyond
 all controversy established; and I say this in order
 that the notion may not go abroad that this Court is not
 competent to inquire into the competency or non-competency
 of an executor.

Having said thus much upon this part of the case, I proceed
 to consider its particular circumstances.

Circumstances
 of the case.

The testatrix, by her last will, appointed Dr. Evans one
 of her executors, and sole trustee of her real estate, and her
 son, Thos. Tyler, the other executor, he having a beneficial
 interest in the real estate during life and in the whole of the
 personal estate. The personal property is about £600 only;
 the real estate is stated in the Act to be of the value of £400
 a year, but it appears from the proceedings in the cause that
 it is supposed to be of much greater value from the minerals
 under the surface of the estate, for there is a direction in
 the will that the mines and minerals under one farm shall
 not be sold for less than £30,000. It is therefore a very
 important question for the parties interested,—as a large
 property has to be administered,—under whose superintendence
 it is to be administered. This lady, who was at her
 death about eighty years of age, had a son and a daughter;
 the son is unmarried; the daughter married Mr. Morgan
 Evans, and their daughter is married to Mr. Rees Jenkins,
 an attorney. The son is about sixty, and he lived with his
 mother down to the time of her death. In 1837, she made a
 will in her own handwriting, by which she bequeathed her
 whole property to her son absolutely, and appointed him
 sole executor. This will remained unrevoked until 1848,

^{*} 2 M. & K. 4.

[†] Ordo Jud. tit. 219, s. 1.

when a new will was made for her, by her solicitors, and was executed by her in June, 1848, in which her son, Mr. Thos. Tyler, is continued sole executor, with a beneficial interest in the whole property during life, and a full power of appointment over the whole. It appears that, in the early part of 1848, this lady had contemplated an alteration of the will of 1837, and there is a letter addressed by her to Dr. Evans, dated 26th February, 1848, which is important as showing her opinion as to the competency of her son to manage his affairs, and it is argued from thence that she must have considered him incompetent to manage her estate without some protection. [Read the letter.*] This letter shows that she considered her son not fit to act alone with any advantage to himself in the management of the property, and that it was necessary for somebody to aid and assist him. But it does not carry to my mind the conviction that she considered him totally incompetent to act; and I say so, because in no part of the testamentary papers before the Court was it intended that Mr. Tyler should be excluded from a participation in the management of the property, which he was to have during life; though it was considered necessary that he should have the aid and assistance of persons more conversant with the management of property and of the minerals under the surface, in order that he might not be imposed upon, and she states that "people are watching to take advantage," which might exercise a prejudicial effect upon the property.

The answer to this letter does not appear; Dr. Evans wrote an answer, but it was not received, and the matter rested until the 20th August, 1848, when she addressed another letter to Dr. Evans, to this effect: "Rev. Sir, As you are so kind as to act for my son in case of my death, I have desired my solicitors, Johnson and Weatherall, Esquires, at the Temple, to send you my will. Had I been able would have sent you a rental of the property." On the 4th September, an answer was sent by Dr. Evans, to this effect:—

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* *Vide* p. 299.

DEC. 1. I have received your letter and likewise the money to which it refers. I have to-day called on Robert Wilton, Esquire, solr., of this place, a schoolfellow of your son's, to ask him the best mode of assisting you in the point to which you refer in your letter. He states that the best mode for you to adopt is to make a codicil to your will, appointing another executor to your will than your son, as it is evident that his timidity and ignorance of mankind render him an unequal match for any serious difficulty that may arise. If you can trust me, I have no objection to act in that character conjointly with your son, and you may depend upon every farthing being husbanded for the benefit of your successors in your property.

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Dr. Evans, therefore, consents to act in conjunction with her son as an executor of the will, and he says further in the letter, that, upon advising with Mr. Wilton, he had suggested that the deceased should republish her will in the presence of witnesses, to obviate any difficulty as to interlineations or erasures; and accordingly the will of June, 1848, was republished by the deceased (a fresh copy being made by Mr. Wilton) on the 9th September, 1848.

This is the history of the preparation of this will, by which it seems that the deceased considered her son capable of acting in the execution of the will, though not, perhaps, with advantage; it removes all possible suspicion that she considered him as in a state of utter incapacity to manage himself and his affairs. By this will Dr. Evans is appointed trustee, and directions are given as to the manner in which the property is to be disposed of, and it also directs that the person to be appointed to manage the estate should be Thos. Evans, the grandson of the deceased, and nephew of Mr. Thos. Tyler. This is not an unimportant circumstance, as it shows that there was not an estrangement on her side from that part of her family.

Upon the death of the testatrix, no information was conveyed to Dr. Evans of the event. Whether the parties were aware that he was an executor is not very clearly shown; but it appears that Dr. Evans received a letter from Mr. Morgan, a surgeon, apprizing him of the old lady's death, and stating that the son was at that time wandering

about, and had come to the *Wyndham Arms*, at Bridge End. Dr. Evans and Mr. Wilton went down, and found Mr. Tyler there, and had an interview with him, and arrangements were made for his removal to Gloucester, where Dr. Evans resided.

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It is important to see what is the evidence as to the state of Mr. Tyler at the time when Dr. Evans and Mr. Wilton saw him at Bridge End. First of all, there is the affidavit of Dr. Evans and Mr. Wilton, in which the former states that, on receiving information of the death of the deceased, he proceeded with Mr. Wilton to the neighbourhood, and the appearers say they frequently saw and conversed with Mr. Tyler, who "was then in such a state of mind as to be quite incapable of taking care of himself." No circumstances are stated from which the Court can judge of the correctness of the opinion they formed. Dr. Evans then states that, as trustee and protector of Mr. Tyler, he suggested his removal to Gloucester, and the suggestion appearing agreeable to him, Dr. Evans arranged with Mr. Morgan to accompany Mr. Tyler to Gloucester. These gentlemen further state that, whilst they were at Bridge End, on passing the house of the deceased on the day of the funeral, they rang the bell, and asked permission to look at the premises, which was refused; and they go on to say that Thos. Evans, the grandson, and Rees Jenkins, "acted throughout all their intercourse with them as of their own authority, and as asserting their own rights, and without reference to Mr. Tyler." Now I want to know in what manner they acted "as of their own authority and as asserting their own rights." In what way did Mr. Thos. Evans act as of his own authority, without reference to Mr. Tyler, "neither having nor professing to have any authority from Mr. Tyler, or to be acting for him or on his behalf?" Dr. Evans then states that, after his return to Gloucester, he wrote to Mr. Tyler the following letter, dated October 15th:—

My dear Mr. Tyler,—We have consulted together respecting you and your future welfare, and think that it would be better that you should come to Gloucester to-morrow (Tuesday), by mail, in company with Mr. Morgan. Your being near us as

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This letter is addressed by Dr. Evans to a person "totally incompetent to manage his own affairs." On the same day there is likewise a letter from Mr. Wilton, Dr. Evans's solicitor, to Mr. Morgan, on the same subject:—

Dear Sir,—I am requested by the Rev. Dr. Evans to express a wish that Mr. Tyler should visit Gloucester as soon as you can make it convenient to accompany him; probably, therefore, you can do so by the mail on Tuesday next, and in that case you will, perhaps, write to say so by return of Post, and Dr. Evans will meet you and Mr. Tyler at the Bell Inn here, on your arrival, which will be at 11 o'clock at night. If that day will not suit, be pleased to say what other day you may be expected. All expenses I shall be happy to pay when I have the pleasure of seeing you.

This was the "arrangement" for the removal of this gentleman from his usual place of residence to Gloucester, the place of residence of Dr. Evans,—a plan by which, according to Dr. Evans, he would escape annoyance and vexation; and this was to be done with the consent of this gentleman, to whom the arrangement, Dr. Evans says, appeared agreeable. From the terms employed in the Act on Petition, in which it is said he was to be removed "in proper charge and proper custody," it would appear that it was not to be a voluntary removal on his part, but a species of coercive removal,—a sort of compulsion; and it is so averred in the Answer. But this charge is denied by the parties, and the Court is bound to believe that all that was intended was, that this gentleman should be removed, with his own free will, to Gloucester, and that Mr. Morgan, the surgeon, was to accompany him, to protect him during the journey. This arrangement was, however, prevented by Mr. Tyler's re-

removal to Swansea on the 18th October. Dr. Evans and Mr. Wilton state, in their affidavit, that "they verily believe that the removal of Mr. Tyler to Gloucester would have been agreeable to his own wishes, and that they had not any reason to believe that the same would be objected to in any way until they were informed that the same had been prevented by Thos. Evans, the grandson." Who so informed them does not exactly appear; the evidence is all the other way, showing that it was at his own desire. Mr. Wilton then states that he wrote certain notices, contained in a letter, as the solicitor of Dr. Evans, "and also under the belief that he was authorized to act as the solicitor of Thos. Tyler, who was considered to be under the care and protection of Dr. Evans." This letter, which is dated 20th October, does not appear to be written by a person representing an individual supposed to be in a state of utter incapacity to manage his affairs. It is addressed to Mr. Nichols, the London agent of Mr. Thos. Evans, authorizing and requiring him to deliver up the will and codicil of Mrs. Tyler, deceased, in his custody, and it begins, "I, Robert Wilton, of the city of Gloucester, gentleman, the attorney and agent of Thos. Tyler, who is one of the executors," &c. This is a most extraordinary letter to be written by a gentleman of respectability, describing himself as the attorney and agent of a person so utterly incapable of managing his affairs as Mr. Tyler is represented to be, requiring the will to be delivered up, in order that it might be proved by Dr. Evans. Mr. Tyler was at Swansea at this time, but Dr. Evans acknowledges, in his Reply, that Mr. Wilton wrote the letter as the attorney of Mr. Tyler. On the same day there is a letter signed "H. and R. Wilton," and addressed to Mr. Thos. Evans, the grandson, to this effect:—

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We are glad to find from your letter an expression that it is your wish that everything should be done according to Mrs. Tyler's will. We hope, for your own sake, looking to your position, and the interest you have under the will, that you will act up to it, and not do any act or lend yourself to any which may be prejudicial to you. All that is required is to carry out fully the trusts and intentions of the will, and there is no reason why it

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should not be done without acrimony, and that the interests of all parties duly attended to, and without incurring any unnecessary expense. We shall be glad if you will, as soon as possible, forward us a statement, as far as you can, of the property, both real and personal, in order that the will should be proved and the trusts carried out, which would be facilitated if you could make it convenient to see us on the matter, and in that case we will be at home any day you may appoint. We think it right to inform you that your uncle has placed his affairs in our hands, as his solicitors, and therefore we are now acting for him, as also for Dr. Evans, his trustee.

It is most unaccountable that Mr. Wilton should have written such a letter as this. If he was satisfied of the incapacity of Mr. Tyler to act with Dr. Evans, why not say so? There could now be no delicacy towards the testatrix in the matter. Why not say he was incompetent to manage his affairs, and therefore the trustee must act on his behalf? It appears to me most unaccountable that such a letter should have been written under such circumstances.

The affidavit goes on to say that Mr. Wilton, having received information that Mr. Tyler had attempted the life of Morgan, his attendant, proceeded to Swansea, on the 23rd October, and found him in lodgings there, under the care and charge of George Bowen, a person accustomed to the care of insane persons; that he had an interview with Mr. Tyler, in the presence of Thos. Evans; that Mr. Tyler appeared quite unconscious who the appearer was, though he had been his schoolfellow, and seen him in September and October; that Thos. Evans had assumed the entire control and management of his person; that he (Mr. Wilton) subsequently applied to Thos. Evans to permit a surgeon to visit Mr. Tyler, for the purpose of ascertaining his state of mind, but he refused; that Mr. Tyler was not permitted to leave the premises, and Bowen slept in the same bedroom with him; that Mr. Tyler still continued under the control and management of Thos. Evans, and both the appearers make oath that "they verily believe that, by reason of his weakness of mind, he is utterly incapable of the management of his affairs, or of performing the duties of an execu-

tor, or of doing any act whatever relating to his affairs, without the aid and assistance of some person therein." Very probably it is so, and was it not for this very purpose that Dr. Evans was joined with Mr. Tyler in the execution of the will? Does this show that there is any reason why the Court should not decree probate to him jointly with Dr. Evans? Dr. Evans goes on to say, in his affidavit, that he accepted the trust and executorship of the will "solely on account of the admitted incapacity of Mr. Tyler to act therein, and for the purpose of protecting him and the property devised to him by the will;" and that, "although he may have spoken of him as a person of some information in literary matters, and as having recollected his schoolfellows, he never spoke of him otherwise than as a person unfit for and incompetent to matters of business, or to manage his affairs." So it is admitted that he has spoken of him as a man of some information in literary matters,—not in a state of fatuity, though incompetent to matters of business and the management of his affairs.

Upon the face of his own affidavit, which contains the whole case on behalf of Dr. Evans, can I collect anything to show that Mr. Tyler is incompetent to do what his mother intended he should do, act with Dr. Evans in the management of his affairs? Dr. Evans and Mr. Wilton state their opinion that he is "utterly incapable of managing his affairs" alone; but no fact is stated that would enable the Court to form an opinion for itself as to his incapacity; and here we have those persons treating him as a person capable of managing his own affairs, going down to him, writing to the grandson and to his solicitor, in possession of the will and codicil, acting as his attorney,—as the attorney of a person capable of acting as executor of the will,—and as such requiring that the will should be delivered up for the purpose of being proved. This affidavit, I say, contains the whole case of Dr. Evans, for what follows is vague.

The next affidavit is that of Mr. Morgan, the surgeon, who states that, from his observation of Mr. Tyler, during his daily visits to him, at the inn at Bridge End, from the 16th to the 17th of October, and from his previous know-

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ledge of him, he is able to depose that he "was and is, so imbecile and of so weak a mind, as to be wholly incapable of the management of himself or his affairs." This is his opinion; but what facts has the Court to depend upon? He does not state the nature of the conversation he had with him. Mr. Tyler was in a low and weak state; but from what did Mr. Morgan collect that he was in a state of utter incapacity? It is a mere opinion formed from what passed between them. Mrs. Morgan, a friend of Dr. Evans, says, she has been informed (by whom she does not state) and believes, that Mr. Tyler was taken to the inn at Bridge End, and that, from her knowledge of him as well as from his conduct and conversation on the occasion (after the death of his mother), she verily believes that he "is so imbecile and weak in mind as to be incapable of the management of himself and his affairs." This is the way of all the affidavits; the mere opinion of the party; and it is upon these opinions that the Court is to conclude that he is insane. The affidavit of Thomas Popkin states that Mr. Tyler is so imbecile and weak in mind, that the appearer "was always and is of decided opinion that he is wholly incapable of the management of himself or his affairs, or of the care of property:" no facts upon which he founds his opinion. The affidavit of Davey refers to the attack upon Morgan, an act difficult to account for, and he expresses his decided opinion, from the appearance of Mr. Tyler and from all the circumstances, that he was "then deranged and of unsound mind." It appears that, on their removal to Swansea, Mr. Tyler was walking on the sands with Wm. Morgan, who had been his mother's gardener, when he attacked Morgan with a knife, and it is pleaded that he was a dangerous lunatic on that day. It may be so; but it is alleged by him that he acted under the influence of sudden passion, from an idea that Dr. Evans was about to remove him to Gloucester, where he did not wish to go. It was not of necessity an act of insanity. With this exception, and a transaction on a former occasion, there is nothing to show that he acted like a lunatic. Davey knew nothing of Mr. Tyler before this, and he has probably never seen him since. He describes a scuffle on the sands, and it

might be an accident, and not an act of insanity. Mrs. Harris speaks of an occurrence five years before, in which Tyler threw a bottle of gunpowder in the fire. Whether it was so or not, the Court is not able to say ; it may or may not be so ; it may have been an act of weakness, but it is difficult to persuade the Court that this was an act of a person totally incapable of managing himself and his affairs. Nothing of this is stated in the Act on Petition ; it comes out in an affidavit at a late period of the cause ; it is very irregularly introduced, and, if it were necessary, I should give the other party time to answer it ; but, under the circumstances, the Court may very well dispense with this.

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This is the evidence on behalf of Dr. Evans ; and what is the conclusion to which the Court is called upon to come? That Mr. Tyler is so utterly incompetent that he is incapable of doing any act whatever. It is impossible on such evidence as this for the Court to come to any such conclusion. He is competent to act with Dr. Evans ; and he is to act jointly with him, the rents being to be collected by Thos. Evans, the grandson, who so far is considered proper to be trusted. It is impossible, on his own showing, that the Court could come to such a conclusion ; but when I look at the affidavits of the fourteen persons on the other side, persons better acquainted with Mr. Tyler than Dr. Evans or Mr. Wilton ; when I see the accounts given by these persons, it is impossible not to consider that they have formed a more accurate opinion. I do not, of course, rely on the opinion of Mr. Thos. Evans, the grandson, and his family, as they may have purposes of their own to answer ; though all this must be conjecture. The grandson had been resident with his grandmother during the latter part of her life ; he was employed by her in collecting her rents, and was trusted by her, and she provided for him in her will, having named him as the person to collect the rents : therefore, *primâ facie*, there is no reason to suppose that he has any improper bias. This person being in his mother's house at her death, I do not think it is very unnatural that a person like Mr. Tyler, not of strong mind, should have

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acted as he did, gone from the house, leaving the property under his care: so that there is no reason to suppose he had any improper views. Mr. Thos. Evans denies that Mr. Tyler is a person of incompetent mind, and swears that "he has always been perfectly rational and sensible, and fully capable of managing himself and his affairs." Jane Mary Jenkins says he "always was and still is quite competent to manage his affairs, and to transact business." Morgan, the attendant of Mr. Tyler, and gardener to the testatrix, says he "is perfectly capable of managing himself and his affairs." There are other persons who had opportunities of forming an opinion as to the state of his mind. Mr. Pritchard, a surgeon, says "he converses freely with him on general subjects, and his conversation is sensible and rational on all subjects introduced;" and he verily believes "he is perfectly competent to manage his affairs." This is strong evidence to show that he is capable of acting in the trusts of the will, and, at all events, that he ought not to be excluded from the probate. The landlady of the *Wyndham Arms*, where Tyler was between the 10th and 17th October, says "she has no doubt that he is perfectly capable of managing himself and his affairs." Either these witnesses are grossly perjured, or Mr. Tyler is not a person utterly incompetent to manage his affairs.

If the Court were to attend to the number of witnesses on either side (though it does not proceed upon any such calculation), there are fourteen on one side to six on the other. But if the Court depends on the opportunities the witnesses had of knowing the state and condition of the party, the balance preponderates in favour of the greater number of witnesses.

But something has been said as to the *onus probandi*,—on whom does it lie? The *onus probandi* lies on those who seek to impeach capacity—when once unsoundness of mind is established, the *onus* shifts. Supposing the Court held there was a doubt of this party's capacity, is it to pronounce that Dr. Evans is alone the person to prove the will? Under all circumstances, the Court must reserve power to Mr. Tyler. But the Court does not doubt his

capacity ; I am not prepared to come to any such conclusion ; on the contrary, I am clearly of opinion that there is no ground whatever to impugn the capacity of this gentleman. It may be very true, that Dr. Evans has laboured under the inconvenience of not being able to obtain the evidence of certain persons ; he should then have proceeded by Plea and Proof, and he could have compelled the attendance of these persons.

I am clearly of opinion that Mr. Tyler is entitled to have probate of the will. Dr. Evans is also entitled to the probate ; but I am clearly of opinion that there is nothing in the evidence produced by Dr. Evans to lead to the conclusion that this gentleman (Mr. Tyler) is incompetent to act in the administration of his mother's affairs, in conjunction with Dr. Evans. I am of opinion to decree probate to pass to both these gentlemen, and to overrule the Petition of Dr. Evans, praying that Mr. Tyler should not be held entitled to probate of the will. As to the costs, Dr. Evans and Mr. Wilton must be exonerated from the suspicion of acting from improper motives ; and upon the whole, I decree probate to both the executors, and I leave each party to pay his own costs.

DEC. 1.
Evans v. Tyler.

Petition overruled.

Costs.

Proctors :— *Wadson*, for Dr. Evans ; *Middleton*, for Mr. Tyler.

DECEMBER 5.

4th Sess.

IN THE GOODS OF MARY DAWSON (WIFE OF THE RIGHT HONOURABLE GEORGE DAWSON), DEC.—*Motion, ex-parte*. Practice.— Administration. — Where a *feme covert*, having a power of appointment by will over £10,000. On the 23rd July, 1847, by will over a certain sum, by her will appointed the same to trustees, upon trust to pay the interest thereof equally between such of her sons as should be then living, and at his death to divide the principal between such of her sons as should

DEC. 5. have survived her, their executors, administrators, and assigns. No executor is appointed of this will, which relates to no other property. On application at the Registry

Dawson, dec.

band, and at his death to divide the principal among the sons who survived her, but appointed no executor,—the Court granted administration with the will to the husband, departing from the then existing practice in the Registry, to make such grants to the persons having the interest.

for Administration with the will annexed to the husband, it was refused, on the ground that the practice then was to make such grants, not to the husband, but to the persons having the interest under the will, the rule being that the grant should follow the interest.

Dr. Haggard moved (Nov. 17th) for Administration with the will annexed to the husband, citing *Salmon v. Hays*.*

The Motion was ordered to stand over, and the Court directed that the practice in the Registry should in the meantime be inquired into.

Haggard now renewed the Motion, suggesting that the practice referred to must have arisen from misapprehension of the case of *Fielder v. Hanger*,† that of a married woman dying intestate, and which was controlled by the later case of *Salmon v. Hays*.

DECREE.

SIR H. JENNER FUST.

There seems to have been some misapprehension, or some oversight, in respect to the principal points determined in the case which has led to this practice. It appears that, in *Salmon v. Hays*, a Motion was made for grant of Administration with will annexed of a married woman to the persons, or some of them, who were legatees under it; but the husband applied to have the grant made to himself. That Motion was opposed, and the case was argued before the Court. Sir John Nicholl was of opinion, and laid it down, that, according to the general practice (referred to in a case,‡ cited in the Argument, which had been decided by Lord Hardwicke), the husband was entitled to a grant generally of the wife's property, and where an executor was appointed under the will, he was entitled to a grant generally, if he chose to take it. Since that case has been determined, it seems, the former practice has been adhered to in

* 4 Hagg. E. R. 387.

† 3 Hagg. E. R. 769.

‡ *Ross v. Ewer*, 3 Atk. 160.

the Registry,—that is, I find some cases where there has been a difference in the practice. I have directed these cases to be looked up, to lay down a clear rule as to the administration of these wills of married women with no executor appointed. The case of *Fielder v. Hanger* is a case of a very different description. In that case, the wife died intestate, having a separate property. The husband took administration; he died leaving goods unadministered, and his executors applied for a grant *de bonis non*, and the wife's relations prayed for administration *de bonis non* to be granted to them; but the Court in that case departed from the rule which had crept in of granting administration, under certain circumstances, to the next of kin of the wife, to whom the property belonged, and decreed that the husband was entitled, in a case of intestacy, to administration, and that it should go to his representatives, and not to those of the wife, who could have no interest. It is a different case from the present. I do not mean to lay down a specific rule until the cases are looked up, and I see under what circumstances administration passed,—whether under the decree of the Court, or the general practice. I say this, because I think, in the present case, there is sufficient to satisfy me that it was not the intention of the party to exclude her husband from all control over the sons during his lifetime. Where the interest is to be paid during the lifetime of the husband, and after his death the principal is to be divided, it shows it was her intention that the sons should not be entirely independent of the father. I am the more confirmed in this by what appears at the bottom of the will, which, though, not being attested, it can have no effect as part of the will, nevertheless shows what her intentions were,—that her husband should not be altogether without control, for she says: “The trustees may pay the above-mentioned money to my sons with the consent of my husband.”

I am, therefore, of opinion; under the circumstances of this case, there being no other parties applying for the grant—if there were, the Court would hear the case argued and discussed on principle,—than the husband, he is entitled to

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Dawson, dec.

DEC. 5. it. I accordingly decree it to him. As stated by Dr. Haggard, he is not to handle the money ; he is not the channel through which it is to pass : it is to go through the trustees, who will take care to have a discharge.

—
Dawson, dec.
 Motion granted.
Nicholson, Proctor.

Where a testator and his wife, domiciled in Scotland, had made mutual wills, bequeathing the whole estate to the survivor, and, upon his or her death, to the children, upon trust for the survivor of them, for life, and then, &c., appointing their children residuary legatees and executors ; upon the death of the testator, a confirmed Testament Dative (equivalent to Administration with will) having been granted by the Court of Scotland to the children, as only executors dative *qua* nearest of kin, this Court granted administration with the will to the children, as universal legatees in trust, limited during the life of the widow.

IN THE GOODS OF JOHN THOMSON, M.D., DEC.—*Motion, ex-parte.*—The deceased died 11th October, 1846, at Edinburgh, leaving behind him a widow, two sons, and a married daughter. On the 22nd June, 1841, he and his wife (both domiciled in Scotland) made and executed, in conformity with the law of Scotland, mutual wills, whereby they mutually bequeathed the whole of the real and personal estate that should belong to them at the decease of the first of them, and also, upon the death of the survivor, to their three children, upon trust for the use of the survivor of them for life, and (the deceased and his wife) for life, and after the death of such survivor, then, subject as therein mentioned, they appointed their three children residuary legatees, and also appointed them executors in the following terms : “And we do hereby nominate and appoint the said William, Margaret, and Allen Thomson, and the survivors or survivor of them, to be the executors or executor of the survivor of us, and the sole intromitters or intromitter with our personal estate and effects after the decease of the survivor of us.” On the 27th January, 1843, the deceased and his wife made and mutually executed a codicil to their will, whereby it is declared that the settlement made on the marriage of their daughter is to be considered in lieu of the legacy bequeathed to her under the will. On the 3rd October, 1849, a Confirmed Testament Dative (equivalent to Letters of Administration with the will and codicil annexed) was granted by the Court of the Commissary Depute of Edinburgh to the two sons of the deceased, and only executors dative *qua* nearest of kin. Some arrears of half-pay and a debt being due to the deceased in England, it became requisite that a grant should be obtained from this Court, and application

was made for a Requisition to swear the two sons, as residuary legatees in trust named in the will during the life of the widow, which was refused on the grounds, that a mutual will was not a document recognized by the law of this country, and only to be enforced as a contract *inter vivos*; and that the widow, as the survivor, was not bound by the appointment therein contained of executors, and might at any future time make her will, and appoint her own executors, and dispose of her property thereby as she might think fit; and the directions of this Court were required to be taken as to the form in which the grant ought to issue.

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Thomson, dec.

Dr. R. Phillimore moved for administration, following the *Motion*. Decree of the Court of Scotland, to the sons.

SIR H. JENNER FUST.

DECREE.

The party deceased was a domiciled Scotchman, and the grant must go as by the law of Scotland, administration being decreed to the parties who are executors dative, according to the law of Scotland.

(Ultimately, after some discussion, the Court decreed administration with the will annexed to the sons, as universal legatees in trust, limited during the life of the widow.)

Farrer, Proctor.

END OF MICHAELMAS TERM, AND OF THE SITTINGS AFTER TERM.

Admissions during the Term :—

AS ADVOCATES.

Nov. 2.—*THOMAS SPINKS, Esq., D.C.L.,* of Saint John's College, Oxford.

JOHN GEORGE MIDDLETON, Esq., LL.D., of Saint John's College, Cambridge.

AS PROCTOR.

Dec. 1.—*ALFRED HEALES, Esq., Not. Pub.*

HILARY TERM, 1850.

High Court of Admiralty.

JANUARY 15.

1st Sess.

Bottomry.— **THE "OSMANLI" (CORBETT).**—*Cause, by Act on Petition.*—This was a cause of bottomry by A. P. Petrocchino, of London, merchant, the holder of a bottomry-bond, against the screw steamer *Osmanli*, and her freight, the defendants, Arnold and Co., of Liverpool, being mortgagees in possession of 62-64th parts of the ship, the owner thereof, Augustus Mongredien, of Liverpool, merchant, having become a bankrupt. The Act on Petition, on the part of the bondholder, alleged that, on the 7th March, 1849, the *Osmanli* put into Malta on her voyage from Constantinople to Liverpool, to fill up her cargo and take in fuel and provisions; that, on her arrival, she was taken possession of by the Marshal of the Commercial Court of Malta, by virtue of a warrant from that Court; that, in order to release her from arrest, to procure the requisite stores, and obtain her final clearances, the master, being without funds or credit, borrowed of Rosario Messina, on bottomry, £850, at 7 per cent., the bond bearing date the 9th March; that it would have been impossible for the ship to have sailed from Malta if the advance had not been made; that she thereupon proceeded upon her voyage, and arrived at Liverpool on the 28th March.

The Answer of the mortgagees alleged as follows:—

That, in 1847, the *Osmanli*, with two other vessels, the *Levantine* and *Aram*, the property of Mongredien and others, employed in the Levant, were despatched in turn from Liverpool, calling at Malta out and home, to land goods and passengers, and take fuel, cargo, and passengers; that the *Levantine* had also made one

A vessel engaged with other vessels, belonging to the same owner, in trade between England and the Levant, calling out and home, at Malta, where agents of the vessels were employed; on her arrival there, after the owner was known to be a bankrupt, was arrested by the agents, under the law of Malta, for a balance of accounts due on transactions for the other vessels, in past years, and for this vessel on a former voyage, and the master, to release her, was forced to give a bottomry-bond for £850 (including £150 for stores to be supplied to the ship), the lender

voyage from Liverpool to the Levant and back in 1846; that the *Osmanki* made several such voyages in 1848, and one voyage from Liverpool to the Levant in 1849, previous to March, and the *Levantine*, a voyage to the Levant and back in December, 1848, and January and February, 1849, all the vessels, out and home, calling at Malta; that Mongredien continued owner of 59-64ths of each vessel up to March, 1848, when he purchased three more shares of each, Anthony Easterby being the owner of the remaining 2-64ths; that Mongredien, as holder of such shares, having the entire management of the vessels, employed Messrs. Robinson Duckworth and Co., of Malta, as his agents, to attend to the business of the same, who received freights and passage-money, and paid for fuel and stores, transmitting to Mongredien account-current of receipts and disbursements; that, on the 12th August, 1848, Mongredien, in consideration of liabilities to the amount of £5,000 to Arnold and Co., assigned his shares to them by mortgage, the sum so secured being still unpaid; that the *Osmanki* left Liverpool on the 12th January, 1849, on which day Corbett was appointed master, and on the 10th February Mongredien was declared a bankrupt; that the ship, having called at Malta, sailed thence for Constantinople, and returned from thence to Malta, on her homeward voyage, on the 7th March, when, two hours after his arrival, the master sent a note to Mr. Leonard, the managing partner of Duckworth and Co., alluding to the failure of Mongredien, and requesting him to make the needful arrangements for the supply of coals and small stores for the voyage home; in answer to which a verbal message was returned, that the coals should be sent on board in two hours, but, in less than that time, the vessel was arrested by a warrant from the Royal Court of Commerce, at the suit of Mr. Leonard, for an alleged balance of accounts with Mongredien, as "agent or director of the Steam-Navigation Society;" that, at an interview between the master and Leonard, the latter said the arrest of the vessel was for debts from the Levant Steam Company (as the owners of these vessels were sometimes called) "for all the vessels," and that, until the claims were liquidated, the *Osmanki* could not go to sea; that, on the 9th March, at a meeting between the master and Leonard, who was accompanied by the advocate and notary of the firm, it was agreed that a bottomry-bond should be executed by the master in favour of Duckworth and Co., and the notary was instructed to prepare it, but the advocate suggested to Leonard that Duckworth and Co. should not take the bond on their own account, but a third party should be found to advance the money; that, at a further meeting

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knowing that the money was to be applied to pay a debt due to the agents of the vessel, and to release her from their arrest:—Held, that the circumstances did not justify the master in executing a bond to cover old debts, —advances, to be the subject of bottomry, must be for the benefit of the ship during that particular voyage, — and the bond pronounced against, except for the £150 for supplies subsequent to the arrest.

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that day, Rosario Messina, a merchant of La Valetta, was introduced to the master, by Leonard, as prepared to lend the money; that, previous to such second meeting, the supply of coals and small stores required by the master had been sent on board the vessel by Leonard, and at such meeting, but before the arrival of Messina, the master inquired of Leonard what was the amount of the debt owing to Duckworth and Co. by the Levant Steam Company, for which he required the bond, who replied that the accounts were not quite made up, but he estimated the amount, including the supply of coals and small stores, would exceed £800, and suggested that the sum to be advanced should be £850, and any surplus should be handed over to the master for the service of the ship; that, on the arrival of Messina, the rate of interest was fixed at 7 per cent., the master protesting against the same as usurious, and the bond was executed, whereupon Messina handed the master a cheque for £850, who endorsed it, and handed it to Leonard, and Messina left without having made any inquiry of the master as to what the money was required for; that, two hours after the execution of the bond, Leonard delivered to the master the accounts (A, B, and C), with £59. 14s. 8d., as the balance due to him on the bond and other moneys on account of the ship, the net balance being £31. 15s. only; that the account A shows a balance of £260, on a general account and interest account of the owners of the *Levantine* and *Osmanli* with Duckworth and Co., from October, 1846, to March, 1849, no part of which sum was owing in respect to the *Osmanli* on her last homeward voyage, in course of prosecution at the date of the bond, the whole of the balance being due in respect of the *Levantine* and *Aram*, and of former voyages of the *Osmanli* (with a trifling exception, under 20s.), the outward and homeward voyages of the said vessels being separate and distinct; that the account B purports to be an account current and interest account between the owners of the *Osmanli* with Duckworth and Co., from May, 1847, to March, 1849, the balance due being £550, the whole of which refers to former voyages of the *Osmanli*, save certain items amounting to £150; that the bond recites that the vessel was arrested at the suit of Duckworth and Co., "creditors not only of the said vessel, but of other vessels belonging to the same line and owners," and that the bond was given to release the vessel from arrest; and the mortgagees further submitted, that the mortgage debt due to them by Mon-gredien is a specialty debt, and entitled to precedence over all debts on simple contract; that, under the circumstances, the arrest of the vessel by the Commercial Court at Malta was illegal;

that the master was not justified in giving a bottomry-bond on the ship for debts incurred by other ships, or on former voyages of this ship, and the effect of the bond, if valid, would be to give Duckworth and Co., simple contract creditors of Mongredien, priority in payment of their debt over the mortgagees of the ship; and they prayed the Judge, before pronouncing for the validity of the bond or otherwise, to disallow the whole amount thereof (£909. 10s.), except the sums of £150 and £31. 15s.,—making, with bottomry premium thereon, £194.

The Reply alleged :—

That, by the law of Malta, a creditor has a lien upon all property whatsoever of a debtor, and that a vessel, as well as any other moveable property, still existing in the power of a debtor, may be legally arrested at the suit of a creditor of the owner for any debt whatsoever, and whether the debt was contracted on her behalf on the last or former voyages, or on the behalf of other vessels or property belonging to the debtor, and he may legally detain such vessel and obtain judgment against the same, and make sale of the vessel to satisfy his debt; and it further alleged that Mongredien, being indebted to Messrs. Duckworth and Co. in an unsettled balance of accounts, as his agents, for necessities supplied to the *Osmanli* and the other vessels, Mr. Leonard obtained a warrant from the proper Court for the arrest of the *Osmanli*, on her arrival at Malta, in March, 1849, which was issued by the Court with full knowledge that the debt was for a balance of accounts due for other vessels, as well as the *Osmanli*; that at the first meeting, on the 9th March, the advocate of Duckworth and Co. did not suggest to Mr. Leonard that they should not take the bond on their own account, and that a third party should advance the money; on the contrary, on the arrest of the vessel, the master immediately consulted an advocate of Malta, as to the legality of the arrest, who advised him (as he had no legal objection to the claim) to take money on bottomry, to release the vessel, Duckworth and Co. binding themselves to him (the master) to return the money in case their claim should prove unfounded; that Messina was not introduced to the master by Leonard, as a person prepared to lend the money on the bond, but, on the contrary, the master, by advice of his advocate, and in pursuance of the practice of the island, employed an agent, who applied to several merchants, but the only person whom the agent found willing to advance the money was Messina, to whom he applied on the 8th March, and when the contract was settled, Messina was

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particularly informed that one part of the money was required to release the vessel from arrest, another to procure fuel and provisions, and another to obtain final clearances from Malta; that, in the preparation of the bond, the notary of Duckworth and Co. was assisted by the advocate of the master, who attended as his legal adviser, and who was one of the attesting witnesses to the bond, and the £850 advanced thereon was the *bond fide* money of Messina, and so advanced in the usual course of business, without understanding with or indemnity from Duckworth and Co., and solely through the mediation of the agent employed by the master, and for which Messina paid the usual fee; that, at the time when application was made for the loan on bottomry, the existence of the mortgage debt was not mentioned by the master, either to the agent employed by him to procure the loan, or to Messina, who, at the time of lending the money, was ignorant of the existence of any debt whatsoever on the vessel, save that of Duckworth and Co., for which it was under arrest.

The Rejoinder, on the part of the mortgagees of the vessel, expressly alleged that no agent, or broker, or mediator whatever was employed by the master to apply to the merchants or money-lenders at Malta, nor did he make any such applications himself, for the advances required on bottomry, save that he requested Mr. Leonard to find a person to make such advances, and throughout the transaction Leonard himself, or by his servants, managed all the negotiations, and that the agent or mediator mentioned in the Reply was Leonard himself, or Joseph Mamo, his servant.

The Sur-Rejoinder alleged that Joseph Mamo was the agent employed by the master to procure the loan, but it denied that he was or is the servant of Mr. Leonard, or of the firm of Duckworth and Co.; on the contrary, it alleged him to be a master mariner, and a person in the habit of acting as agent for steamers.

Nov. 23.
ARGUMENT.

Dr. Jenner, for the bondholder.—The bond was given and the money lent to procure the release of the vessel, and enable her to proceed to this country. She had been arrested, and might have been sold at Malta (for no bail could be procured), where she would have been of less value than here. If the vessel was actually detained, it is

immaterial what was the cause of the detention, whether it was for debt, for repairs, or for any other reason. *The "Hebe."** *The "Prince George."*† *The "Lockiel."*‡

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Dr. Bayford, on the same side, cited *the "Augusta,"*§ Nov. 29. *the "Jane,"*¶ and *the "Fibilia."*¶¶

Dr. Robinson, for the mortgagees.—We deny that, by the law of Malta, there was any legal ground of detaining the ship; but if she was liable to detention, that was no ground for bottomry. The bond was given to cover antecedent debts, some of which had no reference to this vessel.

Dr. Twiss, on the same side, cited Statutes 8 & 9 Vict. c. 89, s. 45, and 6 Geo. 4, c. 16, s. 72; Story, *Conflict of Laws*;** and Abbott, *Shipp.*††

DR. LUSHINGTON.

1850.

Jan. 15.

JUDGMENT.

This suit is brought by the holder of a bottomry-bond, executed at Malta, against the *Osmanli*, a steamer employed in the Levant trade. The action is defended by the firm of Arnold and Co., who allege themselves to be mortgagees in possession of sixty-two sixty-fourth shares. The bond bears date the 9th March, 1849, and it is alleged in the Act on Petition that Corbett, the master, who executed the bond, was the owner of two sixty-fourth parts, but this appears to be a mistake. The maritime interest is seven per cent., and the sum total £909. 10s. The vessel, when she so put into Malta, was on a voyage from Constantinople to Liverpool. The reason alleged for the execution of the bond is, that the vessel was arrested by the marshal of a Court at Malta, and that, to release her from such arrest, and procure the requisite provisions and stores to enable her to proceed to Liverpool, the bond was granted on the ship and freight; and it is further expressly averred, that unless this money had been so advanced, the ship could not have left Malta. On referring to the bond, I find it stated that this warrant of arrest issued at the suit of Robin-

* 4 Notes of Ca. 308.

† 2 Rob. jun. 45.

‡ 1 Dod. 465.

** C. 9, s. 380.

† 4 Moo. P. C. C. 25.

§ 1 Dod. 283.

¶ 1 Rob. jun. 6.

†† P. ii. c. 3, s. 7.

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son Duckworth and Co., merchants of Malta, creditors not only of the *Osmanli*, but of other vessels belonging to the same line and same owners.

The defence contained in the Answer of the mortgagees states the history of various transactions to which I must necessarily advert in some detail. This is a case, as I conceive, very peculiar in its circumstances, and I believe is the first of its kind which has ever been the subject of discussion in these Courts.

Defence.

It is alleged in the defence that this vessel, the *Osmanli*, together with two other vessels, was the property of Augustus Mongredien, Peter Borrie, and Anthony Easterby—fifty-nine sixty-fourths belonging to Mr. Mongredien, three to Mr. Borrie, and two to Mr. Easterby; that these three vessels were employed in the Levant trade from 1847, and up to the date of this transaction, calling at Malta on the voyages out and home, each voyage being distinct and separate; that, in March, 1848, Mr. Mongredien purchased Mr. Borrie's three shares, and Mr. Easterby continued to hold the other two sixty-fourths at the time of the transaction, and is resident in South America. It further states that Duckworth and Co. were the agents of Mr. Mongredien at Malta, received freights, despatched the business of the steamers, and provided fuel and stores for their voyages. The Answer then sets forth the mortgage, which is not disputed in the cause. It further appears that the *Osmanli* left Liverpool on the 12th of January, 1849, and Mongredien became bankrupt on the 10th of February following. The *Osmanli* reached Malta, on her return voyage, on the 7th of March, at six A.M.; the master sent a note to a partner in the firm of Duckworth and Co., alluding to the failure of Mongredien, and requesting him to arrange for a supply of coals and small stores for the voyage home. This note is not produced; the answer to it was verbal, that the coals should be sent on board in two hours. At ten o'clock A.M. the ship was arrested at the suit of Duckworth and Co., for the balance of accounts with Mongredien, as the manager of these three steam-vessels. Here follows a long and detailed statement to the effect, that the bond was originally intended

to be granted to Duckworth and Co., but that, at the instance of their adviser, it was determined by them that another person should be found to advance the money—that the bond was not ready till the afternoon of the 9th—that, previous to the execution, the coals and small stores were sent on board—that Mr. Leonard, the managing partner of Messrs. Duckworth and Co., on being asked by the master for what amount the bond would be taken, answered that the accounts were not yet made up, but that, including the expense of the coals, &c., the amount would exceed £800, and suggested that the bond should be taken for £860, and any surplus paid over to the master—that at the time of the execution of the bond the cheque for payment was delivered over to Leonard—that two hours afterwards Leonard handed over to the master the accounts and a balance of £59. 14s. 8d., which included certain other sums received by Duckworth and Co. on account of the ship. I must presently advert to the accounts. The Answer then concludes by stating that the debt due to Messrs. Arnold and Co. was a specialty debt—that the arrest of the vessel was illegal—that the master was not justified in giving the bond to cover debts for other ships, or for former voyages of the *Osmanki*. Considering all these facts and averments, the Answer ends with rather a singular prayer, namely, that, before pronouncing for the validity of the bond or otherwise, the Court should disallow certain charges in the accounts.

This prayer, and indeed this mode of proceeding, are, as far as I know, without precedent. The Court is asked, as a preliminary question, to take a part of the accounts into consideration, reserving, as I presume it is intended I should reserve, the validity or invalidity of the bond—a question which would be wholly disposed of if I pronounced against the validity of the bond altogether; a question which, if I pronounced for the validity of the bond, would, according to the ordinary course of the Court, be referred in the first instance to the Registrar and Merchants; a question, too, which, if it was intended to admit the validity of the bond generally, has been most unnecessarily encumbered with evidence. It was only after repeated inquiry of Counsel

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the part of the
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that I could at all come to a conclusion as to the meaning of such a prayer as this, and it was at last stated,—though somewhat inconsistently with the prayer,—that the bond was opposed altogether; the only question which strictly the Court could try in this stage of the case. Such a prayer and course of proceeding lead to confusion, and should be avoided in future. But I have no hesitation as to what it will be my duty to do, under all the circumstances of the case—that, seeing no objection was taken in reply to the course so pursued,—though I wish especially to guard against its ever being considered the practice of the Court,—yet, I think, under the circumstances of this case, I must proceed to consider all the questions which arise, namely, the validity of the bond, either *in toto* or in part. I doubt very much whether the Court ought under any but very peculiar circumstances to decide any other question but this, in the first instance, when a case comes before it; because, if it be intended to admit the validity of the bond as to a part of the sums covered by it, the plain, common, and ordinary course is, to admit its validity, and to require a reference to the Registrar and Merchants, and then, before them, in the first instance, dispute the items, so that, before the Court attempts to decide what the law of the case is, it may have a *constat* of the facts, under their authority—namely, as to what parts of the bond appear or do not appear to be properly covered by it.

The Reply asserts—first, the legality of the arrest; secondly, that Mr. Leonard did not undertake to find a person to advance the money on bottomry; that the master consulted with a Dr. Caruana, who advised him to take up money on bottomry; that the master employed an agent, by whose means Mr. Messina, a merchant and banker, undertook to advance the money; that he knew the purpose for which the money was to be raised; that the master was, at the execution of the bond, attended by Dr. Caruana, and advised by him; that the money was advanced without any understanding with Duckworth and Co.; that when the money was so advanced Mr. Messina and Messrs. Duckworth and Co. were ignorant of the mortgage. The Re-

joinder denies the alleged advice given by Dr. Caruana, and that any agent or mediator was employed, and alleges again that the whole transaction was conducted by Mr. Leonard or his servant, Mamo. The Sur-Rejoinder denies that Mamo was the servant or agent of Duckworth and Co.

Such are the contents of the pleadings. I must now look to the evidence, to ascertain which and how much of those statements are supported by the evidence, and so trace, as clearly as I can, the real state of facts, with reference to which questions of law arise.

The first fact of importance is admitted to be true, as well Evidence. as proved by the accounts, viz., that, except for the sum of £150, the whole amount for which this bond was given is the debt due to Messrs. Duckworth and Co. for past transactions—owing to them, as agents, for advances of various kinds on account of ships under the management of Mongredien, engaged in the Levant trade, on former voyages, of which ships the *Osmanli* was one. The next fact is, that it appears by the certificate of registry that the mortgage to Messrs. Cunliffe and Co. was endorsed thereupon. The third circumstance of importance is the question as to the legality of the arrest of this vessel. It is proved incontestably, as I think,—because a question of foreign law must always be taken as a question of fact,—that she was arrested by a warrant from a competent Court, and that on account of debts due to Messrs. Duckworth and Co. ; but there is no evidence to satisfy my mind as to what would have been the ultimate decision if the whole of the case had been brought, or could have been brought, before a competent court at Malta, which whole case, if so brought, would necessarily have included the fact of the bankruptcy of the owner of nearly the whole property in the ship, and the previous mortgage of the same. As a matter of fact, I conclude that the arrest was legal ; what the ultimate effect would have been it is impossible that I can foresee—what would have been the course adopted by the Court at Malta. Fourthly, with regard to the advance of the money by Mr. Messina, I must, in the first instance, refer to the affidavit of Mr. Messina himself.

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No doubt this affidavit in many respects confirms the statement in the Act, and it is not necessary to repeat it. Mr. Messina admits he was aware that the money was advanced in part to release the ship from the arrest of Messrs. Duckworth and Co. For what debt, or why, or wherefore, the warrant of arrest was issued, he did not, as would appear, trouble himself to inquire. He states that he agreed to advance the money at the instance of Giuseppe Mamo; he negatives all request and solicitation on the part of Messrs. Duckworth and Co.; but, if it be a fact of any importance in the case, it is to be remarked, and it is somewhat remarkable, that he does not negative having had any previous communication with them on the subject.

The next affidavit is made by Joseph Mamo, and, before I proceed to consider its contents, I must observe that it is quite apparent, from this and other affidavits in the cause, that either Mr. Messina or Messrs. Duckworth and Co. have the control over the makers of affidavits in Malta; for several of those who came forward to make affidavits in support of the bond are the very persons who, under ordinary circumstances, would be expected to appear on the other side. In such a state of things as this, the vigilance of the Court must not be asleep. Mamo deposes that he was employed by the master; that he introduced him to his advocate, Dr. Caruana; and that, by the desire of both the master and Dr. Caruana, he went round to several merchants to obtain a loan on bottomry, and finally induced Mr. Messina to advance the money. Dr. Caruana's affidavit is, so far as relates to this part of the transaction, to the same effect. The remainder of the evidence relates to the usage as to bottomry and the law of Malta.

I will now turn to the evidence on the part of the mortgagees. The first two affidavits relate to facts not disputed; then there are two affidavits from the master. That is all the evidence on that side of the question.

It appears to me that the facts deposed to in these affidavits do not, for any purpose in this case, materially vary from any statement on behalf of the bondholder; for the principal difference is, as to whether Leonard, by himself or

an agent, procured the advance on bottomry, or whether Mamo, as the agent of the master, did so—a difference which I do not think will be found of any great importance in the ultimate decision of this case.

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From these statements, and from this evidence, I draw the following conclusions:—First, as a matter of fact and of law, that the *Osmanki* was arrested for debts due from Mr. Mongredien on account of advances for the *Osmanki* on former voyages, and for other ships of the same owner or owners; that the arrest did not and could not include the £150 subsequently advanced for coals and other articles. Secondly, that the arrest was, according to the law of Malta, so far as appears, legal; but that the ultimate consequences of such arrest, if all the facts of the case had been brought before the Court at Malta, and all the conflicting claims had been fully discussed, are not and cannot be known from the proceedings in this cause. Thirdly, that Mr. Messina advanced the money on bottomry knowing that it was to be applied to pay debts due to Messrs. Duckworth and Co., and so release the ship from the arrest imposed at their instance. He may have been ignorant of the mortgage; but, assuming him to have been so, if the fact of the mortgage be of weight in the case, I am of opinion that he is not relieved from the effects of a knowledge thereof—for the mortgage is endorsed on the certificate of registry, to which he, by himself or his agent, might have had access. Fourthly, that it may be doubtful on the evidence whether this advance was made by the intervention of a partner in the house of Duckworth and Co., or an agent of the house, with Messina; but that such fact is really not of great importance; for, assuming the statement of the bondholder to be true, no doubt can exist that Duckworth and Co.—whether justifiably or not, is the question—forced a loan on bottomry, and it matters little, under all the circumstances of this case, whether they applied to Mr. Messina, or compelled the master to do so. It is their act, whether they did it mediately or immediately, by pressure on the master. Fifthly, it appears to me that no moral fraud is imputable to any of the parties concerned in this transaction. If the

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law of Malta gives particular remedies, by arrest or otherwise, against a debtor or his property, I see no reason why the creditor resident within the Maltese jurisdiction should not avail himself of it. A merchant resident in Malta, advancing his money on bottomry, in aid, if I may so express myself, of the remedies afforded by the jurisdiction of that island, is equally free from all moral blame. I need not add that, however *bond fide*, to all intents and purposes, such proceedings may have been, all parties must, of course, abide by the legal consequences of such acts.

I have gone at great length into these particulars, especially with a view to satisfy the parties that I have bestowed very full attention upon the case, in some respects novel. I now proceed to the legal conclusions I have formed from the premises, and from the facts I consider established.

Legal results.

I first look at this case as if there was no mortgage, no bankruptcy, no arrest. It is as clear as daylight that, removing these three ingredients, no bottomry-bond could have been legally taken for the debts; for it is contrary to all the principles hitherto laid down, for a master to execute a bottomry-bond to cover advances on a former voyage, or for debts arising from supplies and necessities furnished to other ships, though belonging to the same owner.

Then the first and most important question of law which suggests itself is this, whether the fact of the arrest on account of the debts I have described justifies the master in executing a bottomry-bond to release the vessel, so that such bond shall be valid and legal. Let us consider what would be the consequences of affirming or negating this proposition.

And, first, the consequences of negating it. No doubt a ship with a valuable cargo might be detained at a foreign port, to the great injury of the shipowner, and perhaps damage to the cargo, or loss from its postponed arrival. On whom would the loss fall? I apprehend on the shipowner, who must bear his own loss, from having incurred debts without providing adequate means of liquidation; and he must also bear the loss on the cargo, for not having conveyed it according to his contract: for the arrest of his ship

on account of his own debts can never be a defence to a breach of his own contract. Such would be the consequences of negating the validity of such a bond as this.

We will now look at the consequences of affirming the validity of a bond given under such circumstances. First, as to the shipowner. As, by the law of Malta, it is said, a ship might be arrested for all accounts current, so debts contracted on personal credit may, without any investigation, be actually paid through the medium of arrest and a bottomry-bond; and if the accounts were erroneous, there would be no remedy but a suit in Malta, and it might be against insolvent persons. Such a doctrine would, I think, lead, probably, to the frequent arrest of British ships in foreign ports, and not be to the advantage of the shipowners of this country. But what would be the consequence to the mercantile interests,—to the owners of cargoes shipped on board British vessels? If, under the circumstances described, a valid bond can be given on the ship and the freight, might not the cargo be included also? Could it now be contended, as a legal proposition, that a ship and freight might be the subjects of bottomry and not the cargo? Might not Mr. Messina have required, with the same legal justice, the cargo to be included in the bond? I have not heard that position attempted to be argued, and indeed I could not expect that it would; for I apprehend that all the cases since *the "Gratitudine,"** and the whole course of practice in the Court, show that, where the ship and freight may be the subject of bottomry, the cargo may be hypothecated; and the case of the arrest of a ship on account of a debt of the owner can form no exception; for where the ship is detained, the cargo is equally detained, whatever be the cause of detention. A cargo of a British merchant, however valuable, may be made the subject of bottomry for any debts due by the owner of the vessel, where, by law, the power of arresting the ship exists. If a bond be valid, the owner of the cargo must pay. And to what amount? Not merely the cost of provisions and necessaries and

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* 3 Rob. 240.

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repairs of that voyage, but any sum on account of which the ship may be detained, whatever the amount of the debt may be, and at whatever time the debt may have been incurred. And what remedy has the owner of the cargo for having the cargo made subject to hypothecation, and liable to these debts? Why, if the owner of the ship is insolvent, as he is not unlikely to be,—because, if he is in debt in a foreign port, without credit, it is very probable he is insolvent,—the owner of the cargo has no remedy whatever, except against this insolvent owner of the ship. Unless some distinction could be drawn as to the right of subjecting the ship to bottomry, and not the cargo, it appears to me that, by pronouncing for the validity of this bond, I should establish a principle which might be very detrimental to the interests of the mercantile community, and lead to consequences infinitely more serious than the occasional detention of a cargo by the arrest of the ship.

Authorities.

The next inquiry is, whether there be any authority for the validity of a bond so granted. So far from it, I verily believe this is the very first time in which such a proposition has ever been mooted. It is true, the question may have been discussed,—though not, so far as I know, decided,—whether a bottomry-bond could be granted on account of a ship arrested for debts incurred originally on personal security, for repairs and necessities on that very voyage; but I know of no case where it has been decided, or even contended, that a bottomry-bond could be granted on account of an arrest of a vessel for old debts.

Several cases were cited in the course of the Argument, but there is not one of them, as it appears to me, when I come to look at the circumstances of the case, that has any direct bearing upon the question. The case of the "*Prince George*"* was cited, which went up to the Privy Council, where their Lordships were of opinion that part of the money was actually advanced on bottomry; and though the rest was not, yet they pronounced in favour of the bond to that extent. That was a case of debts incurred on that very

* *Smith v. Gould*, 4 Moo. P.C.C. 25.

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voyage. I do not find that anything was said or done in that discussion which refers at all to such facts as are now before the Court. The observation which I conceive led to the quoting of that case is this: "If it had been proved that the law of New York gave the lien upon the ship, as suggested, we should have thought, upon the general principle, that where the master cannot in any other way raise money which is indispensably necessary to enable the ship to continue her voyage, he may hypothecate the ship. This power would extend to a case where the ship might be arrested and sold for a demand for which the owner would be liable. It seems immaterial whether the necessity for funds arises from such a demand, or to pay for repairs, stores, or port duties." But really, in justice to the noble and learned Lord* who pronounced that judgment, it must be taken with reference to the peculiar circumstances of that case, not as laying down a universal proposition of this immense importance, for the first time, without considering the facts and authorities which alone are applicable to it.

The "*Augusta*,"† also cited, was a case in which Lord Stowell, after deliberation, came to the following conclusion. He determined that, where an agent had advanced money or incurred debts upon personal security, and after he had gone to a certain extent, it was competent to him to say, "I will advance no more money on personal security, and I will require a bottomry-bond as my security for future advances."

The bond in that case—I well remember the case in all its particulars—was so drawn as to cover these sums. Lord Stowell decided that it was a bad bond as to advances on personal security, but a valid bond with regard to subsequent advances. That, in truth, is the sum-total of that case. It is very true that, incidentally, in the course of discussing that question, an argument arose as to the power or as to the right of a creditor to detain the vessel according to the law of the country where the vessel was then lying, and Lord Stowell said this: "It has been said that the

* Lord Campbell.

† 1 Dods. 263.

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party might, by the law of Russia, have detained this ship till the money was repaid; but I do not think that circumstance alone will be sufficient to convert this into a case of hypothecation. Ships might, in all cases, be detained on the same ground by the general law of Europe, and if the position which has been laid down were to be supported, it would go the length of turning every case into a case of hypothecation, or at least there would be a necessity of inquiring, in every case, into the state of the foreign law."

Surely, it never could have been intended by the judgment in the "*Prince George*" to overturn the judgment in the "*Augusta*," except upon a rather fuller discussion of so important a point. But the truth and fact is, it is not necessary to decide, on the present occasion, whether the advances were made on personal security for the benefit of the ship upon that identical voyage, whether the person having made these advances has the power of arresting that ship according to the law of the local Court, and whether, with respect to these particular debts, a bottomry-bond might or might not be lawfully granted. The question here is, whether a bottomry-bond might be lawfully granted for antecedent debts,—there is a broad, wide, essential distinction between the cases.

Now, I really think I should be expending time wholly unnecessarily if I were to go into the general principles on which bottomry is founded. We have but to open a book of authority,—Lord Tenterden's, or any one of a similar kind,—and we shall find it laid down, over and over again, that advances to be covered by bottomry are advances for the benefit of the ship during that particular voyage, and no other. Therefore, I come to this conclusion: that all the general doctrines which are laid down by Lord Stowell, and by all my predecessors in this chair, as well as by Lord Tenterden, and others who have taken the subject into their consideration, militate against this proposition,—not directly, in words, for it never entered into the minds of those who have written upon or discussed the subject that such a case would arise,—but in this way: they describe the circumstances under which bottomry can lawfully take place, and that, by necessary inference, excludes the present case.

For all these reasons, I am of opinion that this bond cannot be supported on the ground of releasing the vessel from arrest for former debts.

But another question remains to be decided,—whether the bond be valid for supplies furnished and advances made subsequently to the arrival of the ship at Malta, in March, 1849. Certainly, the "*Augusta*" and other cases show that a bond may be valid for a part of the moneys borrowed; that an agent may discontinue to supply on personal credit, and take a bottomry-bond for supplies subsequently furnished. How stands this case? Duckworth and Co. were the general agents of Mongredien, and, on being informed of his bankruptcy, they had a perfect right to refuse all supplies on personal credit. How did they act? The vessel was arrested on the 7th of March, and, according to the evidence of Mr. Leonard, for a balance of accounts. These supplies were not then furnished; consequently, the arrest has nothing to do with the £150,—it is wholly independent of it. The ship was not detained for the cost of these supplies; they were furnished with a full knowledge of the bankruptcy. It is contrary to all common sense to suppose that, having resorted to this arrest to protect themselves from the loss of debt on former occasions, they should augment the debt by advancing money in fresh supplies on the personal credit of a man who was a bankrupt. Then, according to the master's affidavit, Duckworth and Co., when applied to for the coals and supplies, sent word that they should be sent on board in two hours. I take this to be true; it has not been contradicted, and I have no doubt as to what is the history of it. Duckworth and Co., being then for the first time informed of Mongredien's bankruptcy, sent this message to amuse the master, and applied themselves in the meantime to obtain the warrant of arrest. I do not know that there is anything very surprising in that part of the transaction. Not a word was said at that time of the refusal to act as they had done before, or of a demand for a bottomry-bond; though no doubt it would have been quite competent at that time for Duckworth and Co. to have refused to furnish supplies, and at that time to have required a bond for the amount of such supplies. It further

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appears that the master consented to give a bond, though it does not precisely appear to what extent; but he agreed to give a bond before the coals and supplies were put on board, and that they were furnished before the bond was executed, and that Messina knew that the bond was to cover the cost of the coals and supplies. Therefore, I think, as it was not to be expected, when the bankruptcy was known, that Duckworth and Co., or any one else, would furnish supplies on personal credit, the cost of those supplies was a proper subject for bottomry. I think I am justified in pronouncing for the bond to that extent. But I wish to observe, I am not prepared to say that, in all cases where a small amount, properly the subject of bottomry, is included in a bond for a much larger amount, not properly the subject of bottomry, the Court would be under the necessity of pronouncing for the small amount. I wish to guard myself against being supposed to say that, in all cases whatsoever,—where, for instance, a bond is granted for £2,000, and the sum of £1,800 is not properly the subject of bottomry,—I would pronounce for the bond, because a small part of it happened to be valid; because, though it may be right, generally speaking, to divide a bond, and say it is valid for this item, but invalid for others; yet, when it is carried to a great extent, it is quite evident such a practice might lead to much fraud, great inconvenience, and great litigation; and I should be alarmed at the practice of attempting to maintain, under the name of bottomry, the validity of such a bond by the introduction of what appeared colourable matter.

The bond valid
in part only.

I have not noticed the mortgage or the bankruptcy, for several reasons; the decision to which I have come renders it wholly unnecessary so to do. That decision is, to pronounce against the bond so far as it is retrospective, and for the bond so far as it is prospective; so far as it is prospective, it does no injury to any right the mortgagees have in the vessel, because their right as mortgagees in the vessel could never put them in a better situation than the owner could have been in, and he had a perfect right to hypothecate her for the purpose of raising necessary supplies to bring the vessel from Malta. Therefore, they are not damaged. Moreover, I am inclined to think that I could not

have taken into my consideration the questions which would have arisen respecting the mortgage and the bankruptcy; I think that they must necessarily have been left to the determination of other Courts which have more extensive jurisdiction in matters of that kind, and better means of forming a judgment. However, I shall not travel further into these considerations, inasmuch as my decision leaves all questions of that kind wholly untouched.

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With regard to the costs, the mortgagees have succeeded Costs. in resisting the greater part of this demand. In strictness, both parties are liable to costs according as they have succeeded or failed; but what I shall do will be this: I shall give no costs; for I think an attempt to divide these costs upon principles of equity would be an attempt to do what I conceive the Registrar would have the greatest difficulty in satisfactorily accomplishing. It is to be lamented, I again say, that those who have opposed the bond have followed the course they have done. Infinitely the better course would have been, to admit the validity of the bond *qua* the £150, and then to have taken an objection as to the larger sum for debts.

I pronounce for the bond so far as relates to the cost of supplies furnished after the 7th March, and against it as to the remainder, which is retrospective.

Proctors:—*Orme*, for the bondholder; *Tebbs*, for the mortgagees.

The following case has not been reported:—

FEBRUARY 6, 1835.

THE "MINSTREL BOY."—*Act on Petition.*—This was an *The "Minstrel* action on a bottomry-bond for Drs. 700, for advances by Mr. *Boy."* Samuel Hyfield, at Leghorn, dated 15th July, 1834, bearing five per cent. premium, and hypothecating the ship, tackle, and furniture. The vessel had sailed from Liverpool on the 6th April, and arrived at Leghorn in May. On the 17th June, intelligence arrived there of the bankruptcy of Mr. Anderton, the owner, at Liverpool, on the 6th of June. The vessel sailed from Leghorn on the 25th July, and arrived at Liverpool in August.

In opposition to the bond, the assignees of the bankrupt owner alleged that the money had been advanced not upon the ship, but

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on the credit of the owner. The vessel earned £86 outward freight, which had been received by Mr. S. Hyfield, who (according to the master's affidavit) continued to make advances for the ship till 14th July, when he refused to let her go without a bottomry-bond, or to set off the £86 he had received for freight against the disbursements on account of the ship, the whole amount of which had been advanced before the bond was proposed. On the part of the bondholder, it was alleged that, early in 1834, Anderton had purchased the vessel with the assistance of Hyfield and Co., brokers, of Liverpool (of which firm S. Hyfield, of Leghorn, was a partner), who took upon themselves a liability for £500 on account of the purchase, on condition that the vessel should be worked between Liverpool and Leghorn consigned to S. Hyfield, at the latter place, who should have a power of attorney to sell the vessel, and that the freight should be received by him (as well as the proceeds of the sale of the vessel), until the accounts betwixt Anderton and Hyfield and Co. were liquidated. On the part of the assignees, this power of sale was denied; but they admitted that the earnings of the ship were to pass through the hands of S. Hyfield. The freight was, therefore, carried to the account of the firm, and no advances were made on the credit of the owner after the middle of June, when the news of his bankruptcy reached Leghorn. They further alleged that, after his bankruptcy, Anderton sent out a power of attorney to a Mr. Petty, at Leghorn, to take the vessel out of S. Hyfield's hands, which Petty refused, and Hyfield went on loading the vessel, but still declaring to the master that he would make no advances without a bottomry-bond. Anderton, however, swore that he was not aware of his bankruptcy when he sent the power of attorney to Petty, and the master swore that the bond was really given to secure the balance of the advance made by Messrs. Hyfield and Co. at Liverpool.

Dr. Addams, for the assignees; *Sir H. Jenner*, K.A., for the bondholder.

JUDGMENT.

SIR JOHN NICHOLL.

My present impression is, that this bond cannot be sustained. The origin of the transaction shows a hard case on the part of Hyfield and Co.; but they have brought themselves into the difficulty by making advances upon Anderton's credit, and going on so to the end, till the bankruptcy took place. They might, in making the advances, and they should, have insisted upon the hypothecation of the ship; but they continued to go on as usual, without the execution of any instrument, upon a sort of understanding. The vessel goes out consigned to one of the part-

ners at Leghorn, and he is to receive the freight; but out of the freight the disbursements were to be paid. It is quite manifest that Samuel Hyfield made advances on the credit of the owner of the vessel, and not upon any understanding that there should be a bottomry-bond; there is no trace of it. Hyfield and Co. do not write such directions to him; there is no suggestion of it in any correspondence; but he goes on to make advances on the credit of the owner, till intelligence of the bankruptcy arrives. Anderton became a bankrupt on the 6th June; at that moment, the vessel and all his property vested in his assignees; they were the owners. If, on the receipt of intelligence of Anderton's bankruptcy, Mr. S. Hyfield had said, "I will do nothing more, but we will close the accounts between the owner and Hyfield and Co.," and from this time all advances had been upon the bottomry-bond, on the authority of cases, had this course been taken, and there had been a clear *constat* that the advances were made solely on the ship, and on an understanding that there should be a bottomry-bond, the Court might pronounce that part of the bond valid. But there is no evidence of this. Here is one mass of accounts, dated 27th July, but no trace that such a course was taken from this time. If S. Hyfield had up to this time made himself liable for advances in cash, or other liabilities, it must have been on the credit of the owner, and he could not convert them into a *lien* upon the ship. The probability is that, from that time, he was endeavouring to get himself and copartners out of the difficulty in the best way he could, and he endorses upon the bill of lading that the freight had been paid at Leghorn, which was to the prejudice of the general creditors. There is nothing before me which will authorize me to pronounce for any part of this bond at present, and therefore I pronounce against it. But I think it a hard case against Byfield and Co., who undoubtedly advanced money for this vessel; but it was their own fault if there was no hypothecation, and no instruction to the broker at Leghorn; and, considering that it is a hard case upon them, as they must come in as general creditors, I shall not give any costs on this occasion.

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JANUARY 18.

Add. Court Day.

THE "BOLD BUCCLEUGH."—*Protest*.—This was a cause of damage by collision by the owners of the late barque *William* against the steam-ship *Bold Buccleugh*. The action was entered on the 27th August; the vessel was arrested at Collision. — The owners of a barque sunk in the Humber in a collision with a steam-

JAN. 19. Hull, and bail was given to answer the action, under Protest. The Act on Protest (dated 31st August, 1849), on behalf of Daniel Harmer, of Norwich, the present sole owner of the steam-ship, alleged that on the 30th January, 1849, a suit was commenced in the Court of Session in Scotland, on behalf of the owners of the barque *William*, against A. Greig, P. Greig, and T. Barclay, partners of the firm called the Edinburgh and Dundee Steam-Packet Company, the then owners of the *Bold Buccleugh*, to recover compensation for the loss of the barque, alleged to have been run down by the steamer, and totally lost, on the 14th December, 1848; that, in pursuance of the Writ of Summons issued in the suit, the steamer was arrested and released upon bail; that this suit, and also a suit by the owners of the cargo in the *William*, against the owners of the *Bold Buccleugh*, were still pending in the Court of Session, and expected to come on for hearing in that Court in December, and that the cause of action in this suit (in this Court) is the same as in the lawsuit depending in the Court of Session in Scotland; and it further alleged that, on the 26th June, 1849, the then owners of the *Bold Buccleugh* sold and conveyed the same to the said Daniel Harmer; wherefore he prayed to be dismissed.

The Answer (dated 6th November, 1849), on behalf of the owners of the *William*, alleged that the barque having been sunk on the night of the 14th December, 1848, by the *Bold Buccleugh*, which was then, and for some time previous thereto had been, trading between Leith and Hull, an action was entered in this Court on the 19th of that month against the steamer, by the owners of the barque, to recover the loss sustained by the running down of their vessel, and a warrant under seal of this Court was extracted on the same day, and forwarded to Hull, for arresting the steamer, which had, however, quitted the port before its arrival, and it never thenceforward came within the jurisdiction of this Court until August last, the then owners having also, when applied to on behalf of the owners of the *William*, refused to appear and give bail to the action; that thereupon the suit referred to in the Act was commenced in the Court of

Session in Scotland, and for a time prosecuted there, but it denied that such suit was still pending, or at least being proceeded with there; for, on the contrary, it alleged that the steamer having, in August last, arrived at Hull, the owners of the *William* (the day for the return of the former warrant having expired) caused a second warrant for her arrest to be obtained and executed against her, being the earliest period at which she could be arrested, and whereupon they abandoned absolutely, and caused to be discontinued, the suit so of necessity commenced by them in the Court of Session in Scotland, in which Court accordingly there was no longer any such suit pending; that the present owner of the *Bold Buccleugh* well knew, at the time of his purchase, of the unsatisfied claim outstanding against her on account of the damage done to the *William*, and did provide, or might have provided, accordingly.

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Bold Buccleugh.

ginally proper
forum by com-
pulsion against
the owners of
the barque, who
had a right
to abandon the
suit in Scot-
land, and to re-
commence an
action in this
Court; and that
the change of
ownership did
not exonerate
the vessel, the
present owner
having a re-
medy against
the vendors.

The Reply, with reference to the averment that the suit in Scotland had been abandoned, alleged that Mr. Harmer, being advised that he had an interest to oppose the dismissal of the suit, on the 6th November (the day on which the adverse Proctor brought in his Answer), the agent for the defenders in the suit alleged in Court that they had an interest to oppose the motion for leave to abandon the suit, and intended to sist another party (Mr. Harmer), interested to maintain the defence; whereupon the Court allowed the defenders to put in a minute of answer before the 8th November, and also a minute proposing to sist the new defender; that, on the 9th November, in consequence of the defenders having failed to lodge any minute, the Court dismissed the action, but that such order of dismissal is not final, and that the agent for the defenders had lodged an application to the Court to recall the same, and grant permission to them to state the grounds upon which Mr. Harmer contends that he had a sufficient interest to oppose the dismissal, and that the dismissal or otherwise of the suit remains subject to the order of the Court, to be made in the matter of the application; and it denied that Mr. Harmer was aware at the time of his purchase of the ship that there was any unsatisfied claim outstanding against her

JAN. 18. on account of the damage sustained by the *William*, or on
Bold Buccleugh. any other account, or did provide, or could have provided,
 accordingly.

The Rejoinder alleged that the application to the Court, referred to in the Reply, had not only been made by the defenders, but had been granted, and that they having complied with the orders of the Court in reference to the lodging of the minutes, the question of the dismissal of the suit was, on the 6th of December, fully argued before the Court, and that it was finally dismissed.

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 ARGUMENT.

Dr. Haggard and *Dr. Jenner*, in support of the Protest, contended that there was *lis alibi pendens*, and that there had been a *bond fide* purchase of the vessel subsequently to the commencement of the suit in Scotland, and prior to the arrest of the vessel. If the Protest was not sustained, there might be a collusion between the parties against the purchaser in such a case, and great prejudice would arise to the interests of commerce. *The "Volant."** *The "Druid."*† *The "Fortitudo."*‡

Dr. Addams and *Dr. Robinson*, for the owners of the barque.—The transfer of the vessel to another party will not get rid of the remedy *in rem*, and the other ground of protest, *lis alibi pendens*, is not made out; the suit in Scotland was actually abandoned.

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 JUDGMENT.

DR. LUSHINGTON.

It appears from the proceedings in this case that, on the 14th of December, 1848, the *Bold Buccleugh* came into collision with the *William*, whereby the *William* was sunk. This disaster occurred in the river Humber, and it is alleged, and not denied, that the *Bold Buccleugh* was a steamer trading between Leith and Hull. On the 19th of December (being very soon after the accident had occurred), an action for damage was entered in this Court on behalf of the owners of the *William*, and a warrant forwarded to Hull; but the steamer had left, and consequently could not

* 1 Rob. j. 383. 1 Notes of Ca. 503.

† 1 Rob. j. 391. 1 Notes of Ca. 451.

‡ 2 Dods. 58.

be arrested. The owners of the *Bold Buccleugh* were applied to to give bail to the action entered in this Court, which they declined to do. The *Bold Buccleugh* still continuing out of the jurisdiction of this Court, the owners of the *William*,—who, it seems, were resident in this country,—commenced a suit against the owners of the steamer in the Court of Scotland; the steamer herself was arrested, and bail was given. In the latter end of August, 1849, whilst these proceedings were pending, the *Bold Buccleugh* was found within the limits of the jurisdiction of this Court, and arrested by another warrant issued from it. The owner of the *Bold Buccleugh* gave bail, and appears under protest, and an Act on Petition, under protest, is brought in. The matters contained in this Act are not, strictly speaking, facts whereon to found a Protest; in truth, the principal averments therein contained are, plea in bar,—plea to estop the exercise of admitted jurisdiction. But this mode of proceeding is a convenient one, and it matters little what name is given to it.

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Bold Buccleugh.

Then, what are the contents of this Protest? Briefly expressed, they are, first, that at the time of the arrest there was *lis alibi pendens*; secondly, that the ship was sold in June, 1849, prior to the arrest under the authority of this Court. Now, as to the first, *lis alibi pendens*, it is quite true, as a matter of fact, that such was the state of things at the commencement of the present suit; and it is, as a general principle, quite true, that no Court will allow that two suits for the same purpose shall be maintained at the same time before two competent jurisdictions. But there are some peculiarities in this case which require to be considered.

It is true that this action is, in some respects, in the nature of a transitory action, but not exactly so with relation to this Court. The cause of action originated within the jurisdiction of this Court. The most powerful arm of the Court is directed against the ship herself, and the ship was originally, at the time of the collision, within the jurisdiction of this Court; she was withdrawn by the owners from the jurisdiction attempted to be exercised, and withdrawn also from her usual occupation. The result of this was, that the

Peculiarities
of the case.

JAN. 18. English owners were compelled to proceed in Scotland,—I do not say unduly compelled, because when the property is removed, the action must follow the person, and the Scotch owners, the owners of the *Bold Buccleugh*, had, perhaps, a right, if they could, to restrict the litigation to their own Courts; still less do I mean to say that perfect justice might not be had before Scotch tribunals. But, however this may be, the cause was removed from what was originally the proper *forum*, and by compulsion against the English owners. I think no doubt can be entertained that the English owners had a perfect right to abandon such suit in Scotland, and to proceed against the ship, if she came within this Admiralty jurisdiction. Had they discontinued the action in Scotland prior to the arrest of the vessel in August, I am of opinion, beyond all doubt, that I must have allowed this action to be prosecuted.

Plea of *Es alibi pendens*. There are many authorities to be found in the books as to *lis alibi pendens*, but none, that I am aware of,—none have been cited,—which deny to a suitor the liberty of abandoning an action before one jurisdiction and resorting to another equally competent. But it may be said that, at the time of the arrest of this ship, there then certainly was an action pending and not abandoned; in my previous observations, I have alluded to the suitor abandoning an action and afterwards commencing a new one. There certainly was in this case an action actually pending. Here, however, arises another peculiarity in the very nature of the transaction, and I think well deserving of consideration. The English owners could not tell when the ship would come within the jurisdiction of this Court: they could not, with prudence, abandon their suit in Scotland on the mere chance that they would be able to proceed here. They do arrest her at the very first opportunity, and do withdraw their action in Scotland at the very earliest period it was possible to withdraw it. Under all these circumstances, I am of opinion that the plea of *lis alibi pendens* cannot be sustained.

Not sustainable.

The second objection is, that, prior to the arrest, the ship had been sold, and that it is unjust towards the purchaser

to allow the ship he has bought and paid for to be proceeded against in this suit. Now, it is quite manifest that the mere change of property does not exonerate the ship from liability to be sued. No one can reasonably contend that a sale after a collision, with a knowledge of the fact, would produce that effect; because, if so, the owners of a vessel doing damage would have nothing to do but to sell her, for the purpose of taking from the party aggrieved their best security for compensation. Therefore, as a general principle, I am prepared to deny that it is true that a mere transfer of a vessel, which has been guilty of doing damage, can at all diminish the liability of that vessel to be arrested.

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It has, however, been urged in the present case, that the ship, having been bailed by the Court in Scotland, was released from all responsibility; and it is true, I apprehend, that she could not have been again seized in that suit by the present plaintiffs—namely, in the suit in Scotland. But I do not think that that circumstance affects the proceedings here. There is no evidence even to the effect that the present owner knew anything as to the action or bail at the time he made the purchase. What he did know is left, I am sorry to say, very much in the dark. If he knew there had been a collision, then certainly he might have protected himself, either by not making the purchase, or by some other precaution. But it appears that this gentleman, the owner of the vessel, was advised to commence a proceeding in the Court of Scotland, for the purpose, if he could, of protecting himself. The matter is rather darkly before me; but I apprehend the *gist* of the proceeding was to endeavour to induce the Scotch Court not to allow the suit to be abandoned, and to keep before it the bail which had been given to answer the action which had been brought in Scotland. Now, I think it hardly necessary for me to enter minutely into a consideration of what was done in Scotland, because, of course, I am bound by the result of their proceedings; and it is not for me to examine into the reasons upon which those proceedings were grounded. So far, however, as I am able to conjecture, the nature of the proceedings was of this kind. There is a head of law in Scot-

JAN. 18. land, well known, called the "*jus quæsitum tertio*;" that is, where, in a suit between two parties, there arises an interest in a third party. There was, I presume, on that ground, an attempt made in Scotland to retain the bail for the benefit of the purchaser of this vessel; but that attempt failed; therefore, of course, I must come to the conclusion that, in reality, this person had not, by the law of Scotland, any right or interest to retain the bail in that Court,—and I must proceed on that view of the case. If it be true, then, that the mere act of transfer of the vessel will not release the purchaser,—if it be true that a competent Court has decided that he had no interest in the bail actually given in that action,—in what way am I to come to a conclusion favourable to that purchaser, and say that he is released from his liability?

Nor that of
change of own-
ership.

Bald Buccleugh.

In the course of the argument, reference was made to the case of *the "Druid,"** but in that case, the whole of the judgment proceeded upon a very peculiar state of circumstances. The case was briefly this: the master of a steam-tug wilfully ran into a foreign vessel, and the question which the Court had to decide was, whether the owners of the steam-tug were responsible for the wilful act of the master; and any observation of mine, which did not directly bear on that question, was in the nature of an *obiter dictum*, and must be taken to apply only to the circumstances of that case. I said, in that case, "there are cases of *lien* on a vessel acquired before the existing owners made their purchase. It might possibly be (though I give no opinion whatever on the point) that innocent purchasers might be liable to have their ship attached and sold for the payment of damage occasioned by collision before they purchased, in a case where the former owners would have been responsible." It was not necessary for the Court to give any opinion on that point, but only to lay down a general principle; it was not necessary for me to say a word as to the damage, except to show that I did not mean to include cases of damage in the other cases to which I had adverted. "As to all cases

* 1 Rob. jun. 391. 1 Notes of Ca. 451.

occurring during the ownership of the persons whose ship is proceeded against," I continued, "I apprehend that no suit could ever be maintained against a ship where the owners were not themselves personally liable, or where the personal liability had not been given up, as in bottomry, by taking a *lien* on the vessel. The liability of the ship and that of the owners, I think, in those cases, are convertible terms; the ship is not liable if the owners are not, and *vice versa*." Now, I am not prepared to say that there is anything in the passages I have read which the Court repents having given utterance to; nor does it appear to me that anything I said on that occasion in any degree whatever operates directly on the present case. What I said was this: I refused to express any opinion as to the responsibility of the owner of a ship which had done damage to another vessel before he had become her *bond fide* purchaser.

The Court was anxious, in the course of these proceedings, to know really what was the state of the case with regard to this purchaser,—what measures he had taken to protect himself against possible liability to the action for the damage. But really the papers themselves afforded no satisfactory information at all; and when I applied to Counsel for something in the nature of explanation, I understood the explanation to be, that the original vendors of the ship had been guilty of something little short of misrepresentation in telling him that there had been an action against the ship for damage, but that it was altogether settled. However that may be, if he had any information that a suit had been instituted against the ship, it was his duty to make inquiry, and to protect himself against any consequences that might possibly ensue. This was not a case of entire ignorance; here was a purchase made with some knowledge that there had been a collision, and that there were circumstances which rendered the ship liable to arrest.

I think, on every principle of justice, I am bound to overrule the Protest. I do so with great satisfaction to my own mind, because I do not see that the present owner will sustain any inconvenience or suffer any loss. It is not alleged that the original owners are insolvent, or that, if the damage

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Bold Buccleugh.

Protest overruled.

JAN. 18. is recovered against the ship, and the ship should be sold, the original owners will not be able to make good all the loss that may be incurred. Under these circumstances, it is but ordinary justice that I should overrule the Protest, and direct the parties to appear absolutely. And I must give the costs.

Bold Buccleugh.

Proctors:—*Stokes*, for the owners of the *William*; *Jenner*, for the owner of the steam-ship.

Add. Court Day.

JANUARY 19.

Collision. —
Objections to
Report of the
Registrar and
Merchants, —
sustained.

THE “ALFRED” (HOPKINS).—*Act on Petition.*—This was originally a cause of damage by the owners of the brig *Argus* against the brig *Alfred*, in which the Court pronounced for the damage, and condemned the owners of the *Alfred* in the costs, making the usual reference to the Registrar and Merchants, whose Report, reducing the claim of the owners of the *Argus*, from £683. 3s. 7d. to £468. 19s. 1d., was objected to by them.

The chief items reduced were the following:—Shipwright's account, from £308. 7s. to £216. 6s. 9d.; Blacksmith's, from £34. 11s. 2d. to £21. 17s. 7d.; Pilotage to Sea and Attendance in Harbour, from £8. 18s. 6d. to £4; Surveyor's Fees, from £12. 1s. 6d. to £7. 17s. 6d.; Commission on Advances, from £12. 14s. 9d. to £8. 17s. 11d.; Wages of Master and Crew during detention, fifty days, from £59. 3s. 4d. to £48. 10s. 4d.; Provisions for ten men for the same time, from £37. 10s. to £30. 15s.; Loss of Employment of the Vessel at £2. 2s. per day, for fifty days, from £105 to £27. 8s. 6d.

The Act on Petition, in objection to the Report, alleged that the Shipwright's and Blacksmith's accounts consisted only of charges for necessary repairs arising out of the damage, and none other, and that such repairs necessarily occupied from the 14th February to the 6th April, or fifty days, whereas the Report had allowed only forty-one days; and that, at the period of the year during which the *Argus*

was detained, the loss to her owners by such detention was at least £2. 2s. *per diem*.

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The Answer to the Act denied that the Shipwright's and Blacksmith's accounts were solely for damages occasioned by the collision, and alleged that, on the contrary, comparing those accounts with the statements of damage by the owners of the *Argus*, as well as in the Protest of the master, filed in a suit by the owners of the *Alfred* against the *Argus*, by reason of the collision, and the Reports of the required repairs consequent thereon submitted by the owners of the *Argus*, the Registrar and Merchants were satisfied that very many of the items in those accounts were for repairs done to the *Argus* not consequent on, or rendered necessary by, the collision; it moreover denied that such repairs did necessarily occupy fifty days, inasmuch as they might have been done to the brig whilst afloat, and need not have occupied five days.

Dr. Addams and Dr. Robinson, for the owners of the *ARGUMENT*. *Argus*.—We object to the reductions made in this Report, which the Court must either reform, or refer it back to the Registrar and Merchants for reformation. We complain that they have made those reductions without any evidence whatever, whereas they had the most stringent evidence of the necessity of these repairs, as consequent on, or rendered necessary by, the collision.

Dr. Jenner and Dr. Bayford, in support of the Report.—The Registrar and Merchants had sufficient evidence before them in the Protest and four surveys, and we did not produce other evidence because it was not needed. The Court is not to allow the cost of repairs of damage not necessarily consequent upon the collision. The garboards (planks next to the keel) have been repaired; but they could not have been damaged by the collision. In other items, the Registrar and Merchants concluded that more time and labour had been expended than was necessary.

DR. LUSHINGTON.

JUDGMENT.

There can be no doubt that the parties who received injury in consequence of this collision are entitled to

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be placed in the same situation as they were in before the acts of the wrong-doer were committed; but, of course, it is equally true that they are not entitled to anything beyond their just compensation. The question arises on an objection to certain items contained in the Report of the Registrar and Merchants, it having been referred to them to report in the usual manner what was the extent of damage which had been sustained by the complainants. The Registrar and Merchants, in the exercise of their judgment, have thought fit to make certain very considerable reductions, which I must presently enumerate. The question for the determination of the Court is, whether such reductions have been rightly made.

The principle.

With regard to the principle upon which the Court must proceed, I cannot quite accede to the arguments of Counsel in support of the Report. I apprehend that, however incompetent I may be to discharge the duty devolving on me, yet it is a part of my duty, of which I am not entitled to divest myself, to form my own opinion, upon the evidence laid before me, as to whether the items objected to have or have not been properly disallowed. I do not think that the instance which has been put, namely, the case where the Court is assisted by Trinity Masters, is either correct in point of fact, or apposite to the question; because I never yet pronounced a single decree, when I was assisted by Trinity Masters, in which I was not perfectly convinced that the advice they gave me was correct, and if I had entertained a contrary opinion, notwithstanding all their nautical skill and experience, I am clearly of opinion, having deliberated much on that question, that it would be my duty to pronounce such contrary opinion. The custom of the Court, in asking the opinion of the Trinity Masters, is to request them to state their reasons and their explanations, and if these explanations are not satisfactory to the Court, it does not take them, and the Court never allows persons, perhaps inexperienced in the administration of justice, to raise inferences from a supposed state of facts which does not appear in the cause. It fortunately has happened that in but very few instances has there been a difference of opinion

between myself and the Trinity Masters, and in no case whatever have I pronounced any judgment except it was my own.

Upon the present occasion, the Court undoubtedly is disposed, in the first instance, to receive the Report of the Registrar and Merchants with the strongest desire to believe that it is one correctly made, because the Court has from experience well known the pains, and labour, and judgment bestowed on these Reports, which are very seldom objected to, and which I believe have given the greatest satisfaction to the public at large. But when a case is brought before me, and I have the evidence before me, if my judgment should differ from that of the Registrar and Merchants, I have no other alternative than to follow the dictates of my own mind. Upon the present occasion, there are items of different descriptions allowed and disallowed by the Registrar and Merchants. For instance, there is the Shipwright's account, and the Blacksmith's account, loss of profit from the non-employment of the vessel, and matters of that description. It has been argued, and very strongly pressed upon the Court, that the Registrar has had the benefit of the assistance of merchants experienced in these matters. That proposition is not altogether, I think, correct. I apprehend that merchants have very great experience as to what would be the freight a ship would earn,—great experience in judging of the majority of items which are found contained in this demand; but I apprehend the best judges of what repairs would be necessary in consequence of a collision, and whether they are justly charged, would be shipwrights, or persons accustomed to shipbuilding. [*The Registrar*.—We always have the assistance of persons of that description; we had it in this case. It was the judgment of a shipwright, the survey being compared with the repairs, that more had been done and more charged for than was justifiable. *Addams*.—I apprehend this must be a mistake—the Proctor is not aware of that fact. *The Registrar*.—There is no mistake; the Proctor was not there.] Then the observation I made is true in itself; but the Registrar and Merchants did avail themselves of the assistance of a shipwright in this case.

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What was the evidence which the Registrar and Merchants had before them? It consisted, as I apprehend, of the Protest, four surveys, two affidavits, and the bills and receipts. It has been said that they decided with reference to the Protest and surveys. I confess that does not appear to me to be the best evidence in the case. In the first place, it is well known that Protests are drawn in divers ways. At one time great care and caution are exercised; at another, those qualities are absent. I think a Protest is not in all cases the best evidence of the damage actually done. At the same time, it is right I should say, the Protest in this case is more detailed and more carefully drawn than the great majority of Protests that come before the Court. With regard to the surveys, all I am told is, that, upon comparing them with the various bills and charges made, it would appear that the bills and charges were excessive and exorbitant. But I have read the surveys and looked at the bills, and without the assistance of some explanatory evidence it is wholly impossible for me to comprehend how the proposition is made out, that the surveys are incompatible and inconsistent with the bills. But they are not, I think, the best evidence in the cause; the best evidence would be the testimony of persons who saw the ship, and the damage done to the ship, and were capable, from their practical experience in shipping matters, of estimating what damage was necessary to be repaired in consequence of the collision, and what would be the expense thereof. I think the Registrar and Merchants were left, on the present occasion, in a predicament in which they ought not to have been placed, especially if it was intended to object to the charges contained in the bills; they ought to have been furnished with the evidence of more than one individual of experience. It is truly observed, that the owners of the ship doing the damage, residing in the immediate vicinity of Portsmouth, might have produced the testimony of persons who saw the vessel, to impugn the bills, if they could be impugned. But in what state were the Registrar and Merchants left? There is the affidavit of Mr. Gibbon, who swears that the *Argus* arrived at Portsmouth on the 15th of February, and was

detained there during and for such repairs till April 6th ; that, "during that time, certain work was done to her, irrespective of the said repairs, whereby, however, no detention was occasioned to her, the same having proceeded contemporaneously with the said repairs ;" that the schedule annexed to his affidavit "contains a full and true statement of the expenses rendered necessary by the collision," which were paid by the owners on the 7th June. Unless this gentleman is grossly mistaken, his affidavit furnishes strong evidence as to the repairs done.

But a great deal of comment has been made upon the subject of there being other repairs done at the same time, besides those consequent on the collision. I apprehend that, almost in every case of collision, the owners avail themselves of the opportunity of doing other repairs, which may then be effected at less expense to themselves. If they attempt to include these other repairs in the amount of damage done, they are guilty of fraud ; but if they simply avail themselves of that opportunity, without injury to the persons who pay for the repairs consequent on the collision, no blame is imputable to them ; but it is quite right that the Registrar and Merchants should exercise their vigilance, and see that no greater charge is made against the defendant than he is justly entitled to pay.

The only other affidavit before the Registrar and Merchants is that of Mr. Gallon, the managing owner of the *Argus*, which states the history of the ship from the beginning to the end ; and, so far as I can find, they had no other evidence before them. *Prima facie*, the evidence produced on the part of the owners of the *Argus* was sufficient ; but, on the other hand, there was no evidence at all produced by the owners of the *Alfred*, and there was no attempt to clear up doubts or difficulties, except by inference from the surveys, which surveys it does not follow of necessity included everything which ought to have been done.

So stood the case before the Registrar and Merchants ; and Evidence. now it comes before me on an Act on Petition, with additional affidavits on behalf of the owners of the *Argus*, and two on the part of the owners of the *Alfred*. I will take the latter first.

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There is the affidavit, no doubt, of a respectable gentleman named Snook, a shipbuilder in this town. He states that he has carefully and most attentively perused and considered the Protest, surveys, and bills, and he comes to the conclusion, and most positively makes oath, "that very extensive repairs have been done to the *Argus*, beyond those stated in the Protest and surveys to be what were necessary to make good the damage sustained by the collision." Now, in the first place, he points out none of these repairs; he never saw the ship, and he had no means of forming an accurate judgment at all. Then he states that he could and would have executed the repairs rendered necessary to make good the damage, as set forth in the Protest and surveys, in five days, and whilst the *Argus* was afloat. If this affidavit be true, I apprehend the Registrar and Merchants have acted most liberally towards the owners of the *Argus*; for the repairs could not have cost anything like the money they have given: if the repairs could have been done in five days, and whilst the ship was afloat, they could not have come to a fourth of the charge allowed. I must say that I think this mode of swearing is rather dangerous.

The next affidavit is that of Mr. Laing, who goes over the same ground, and comes to the same conclusion. He says that "the respective sums of £216. 6s. 9d. and £21.17s. 7d., which have been allowed by the Registrar and Merchants for the two bills, are most ample and liberal, and much more than could have been charged for repairing the damage sustained in the said collision." So that, if we take the evidence of this gentleman, the Registrar and Merchants have made a mistake the other way, and I ought to send back the Report to be reduced in amount. I must say that these affidavits, made as they are by gentlemen who never saw the vessel, and know nothing about it, are not very satisfactory to my mind.

But the evidence does not stand uncontradicted. I hold affidavits on the other side; and upon what ground am I to assume that the gentlemen who make them are unworthy of credit? They are Mr. S. W. Garratt, Mr. T. White, and Mr. J. Oakshott; *prima facie* they are entitled to reasonable credit at

the hands of the Court. They say they were employed in repairing the *Argus*, and they swear that the whole of the Shipwright's account, amounting to £308. 7s., and the whole of the Blacksmith's account, amounting to £34. 11s. 2d., "were justly and truly incurred and disbursed in replacing and repairing the losses and damages sustained by the *Argus* in and by the collision." They state, that although other work was done to her, care was taken to keep the accounts separate, and that one item which was first charged in the private bill was by mistake copied into the other; but I apprehend that such a mistake does not go to invalidate their general evidence.

The next affidavit is made by Mr. Garratt, Mr. Claughton, and Mr. Oakshott. Mr. Oakshott makes oath that, in conjunction with Mr. White, he made four surveys of the *Argus*; "that, at the time of making the first survey, the brig was afloat and laden, and it was then wholly impossible to ascertain fully the extent of the damage she had sustained; that, with a view to save expense, they only recommended part of the cargo to be discharged, in order to a more effectual examination of the brig; but as the process of unlading her went on, further damage was developed, all done by the collision: and they ultimately ascertained that she had thereby been so severely strained and injured throughout, that the course recommended by their third and fourth surveys and reports was absolutely necessary for her safety in prosecuting the voyage on which she was chartered." [*The Registrar*.—It might have made a great difference if these affidavits had come before us.] No doubt it would. Mr. Claughton says, although he did not actually attend the surveys and examinations of the brig whilst afloat, yet he superintended the hauling her upon the patent slip, and examined her there, and attended the fourth and final survey, preparatory to her being repaired, "and did fully and accurately examine all the losses and damages occasioned to the brig by the collision." And all the deponents make oath that, throughout the whole of the repairs, the utmost care was enjoined by the agents and captain of the brig, and was exercised by them, to avoid every possible

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delay and expense not strictly needful; that the time occupied in the repairs unavoidably extended to the 6th of April, and that "the idea of repairing the damage whilst she was afloat would have been utterly impossible and absurd, the whole of her hull and bottom requiring caulking thoroughly." There are two other affidavits, which relate to the compensation for freight.

With these affidavits before me, I do not think that the Court has any alternative but to make alterations in the Report made by the Registrar and Merchants. It appears to me that I must refer the Report back, with directions to restore the Shipwright's bill from £216. 6s. 9d. to £308. 7s.; the Blacksmith's bill from £21. 17s. 7d. to £34. 11s. 2d. With regard to another item, the wages of the master and crew during the detention of fifty days, it appears to me that there is nothing in the evidence to justify its reduction, and I direct that item to be restored to the original sum; and so also as to the provisions. As to the "loss of employment of the vessel," which is charged at two guineas a day, that is an item respecting which merchants are peculiarly competent to form a judgment. I have read the evidence, and I cannot satisfy myself that the Registrar and Merchants are wrong: therefore I do not disturb the deduction as to the loss of employment for that space of time.

Report to be
reformed.

With respect to the other items, I refer the Report back to the Registrar and Merchants, to be reformed as I have directed. I will only add, that cases may occur in which the Court might feel a difficulty in deciding as to items concerning which it has no practical knowledge; but I do not find myself in that difficulty here, because I have the evidence of competent persons, and they are contradicted by nothing but inferential evidence. I do not think the protest and surveys alone are sufficient to show all the damage done to the ship, and for which compensation is to be made. It may be so, or it may not; but I am not satisfied that that is altogether a principle which I should venture to adopt. [*Addams*.—The Court will give the costs of the objection?] Yes.

Proctors:—*Stokes*, for the *Argus*; *Rothery*, for the *Alfred*.

JANUARY 29.

Add. Court Day.

THE "WILLIAM LUSHINGTON" (GILL).—*Cause, by Salvage. —*
Act on Petition.—This was a cause of salvage by two An agreement
 licensed pilots and eight seamen of Plymouth, to obtain or understand-
 a recompense for alleged salvage services rendered to this ing between the
 vessel, timber-laden, from Quebec to Plymouth, which, on owners of the
 the 28th August, 1848, got upon a ledge of rocks between vessel salvaged
 Mother-Combe and Stoke Point, in Bigbury Bay. The and the owner
 salvors alleged that, being informed by her owners that the of a cutter en-
 vessel was stranded in Bigbury Bay, they proceeded thither, gaged by them
 and found her masts cut away, and no person on board ; to render the
 that they set to work to clear the rigging, in which they service, — no
 were aided by the crew, who subsequently returned on specific sum be-
 board, and, at a later period, the *Sir Francis Drake*, mer- ing fixed there-
 chant steamer, acting in concert, under the direction of in,—Held not
 James Hyde, they got the vessel off the rocks, and into to bar the par-
 Plymouth Sound, whence she was removed into Catwater, ties suing (in-
 and safely anchored, under the direction of Hyde. On the cluding the
 part of the owners, it was alleged that, on receiving intelli master and
 gence of the stranding of their vessel, they proceeded to crew of the cut-
 Bigbury Bay, and having eased her, by cutting away her ter), who acted
 masts, they hired a steamer (the *Sir Francis Drake*) to tow in the service
 her into Plymouth, and engaged James Hyde, a pilot whom under the per-
 they had been in the habit of employing (the owner of the sonal direction
 cutter whose master and crew were some of the asserted sal- of the owner of
 vors), to assist in the service, it being understood between the cutter, but
 them, as on all former occasions of a similar kind, that a fair were not par-
 and proper charge was to be made by Hyde for the whole ties to, or cog-
 of such service, including the pay of the cutter's crew, when nizant of, the
 the same was completed ; that the pretended salvors acted understanding.
 under the directions of their employer, Hyde, and that not — An agree-
 one of them was engaged by the owners, but all were ment, though it
 employed solely by Hyde, in pursuance of the agreement may estop par-
 and undertaking entered into between him and the owners, ties from suing,
 and for the costs and expenses of the performance of which cannot affect
 agreement the owners were liable to Hyde ; wherefore they the nature of
 prayed the Court to pronounce that no salvage was due to the service.

JAN. 29. *Dr. Harding and Dr. Twiss, for the salvors ; Sir J. Dodson, Q.A., for the owners of the vessel ; and Dr. Robinson, for the owners of the cargo.*
—
William Lushington.

JUDGMENT. DR. LUSHINGTON.

(After pronouncing that the service was a salvage service.)

That being so, the next point in the case is, what was the agreement, and what is the effect of it? It has been argued, that the agreement was to affect the nature of the service itself: that is utterly impossible. An agreement, if entered into, might be a bar to the parties recovering a salvage reward, because they would have estopped themselves from proceeding in the suit; but to suppose that an agreement can convert that which is originally a salvage service into one of a different nature, is to suppose that which is utterly inconsistent with every principle of law. It is very true that, where a vessel is on shore, in the manner that this was, and where the owners are cognizant of it, and select their own salvors, though they cannot convert a service which from its own nature and kind is inconvertible, yet they may protect themselves against a demand for performing it, by entering into an agreement, and fixing in some way the amount of reward that shall be paid. This they are fully at liberty to do. Now, what takes place on the present occasion? Mr. Thomas Pope was the individual with whom the original agreement was made. He states, "When he and his brother were discussing together about the hire of a smack, his brother suggested that James Hyde, a pilot—whom he and his brother, who are owners of many ships, were in the habit of employing for the last fifteen years, for pilotage and other purposes of their ships, and who is the owner of the cutter *Surprise*, of about fifty tons burthen, Hyde being also the owner of the cutter *James and Elizabeth*—might be usefully engaged for the purpose of bringing the sails, rigging, and stores to Plymouth." Even these words of Mr. Pope himself would support my conviction that this vessel was hired for a salvage service. If the vessel had been hired simply to bring away a certain

quantity of gear lying on shore, it would have been a very different question. She was hired not only to do that, but to strip the vessel, which requires nautical knowledge and skill, and to render other services to the vessel lying on the rocks. This was a general engagement to enter upon the service, and Mr. Pope did not entertain a doubt of it. It was not expected that this cutter would go out and tow the vessel to Plymouth. It required a greater force to extricate her from the situation in which she was placed than the cutter possessed, and hence the assistance of the *Sir Francis Drake* was procured, with which it was competent for the owners of the *William Lushington* to make an agreement which should bar a claim for salvage. But let us see what was done, according to the statement of Mr. Pope. He says, "Accordingly, he went to James Hyde, and engaged him to go to the ship, with his cutter the *Surprise*, and with such of his men as he could depend upon, to assist in clearing the rigging and bringing the same, and the sails and stores of the ship, to Plymouth." He further swears: "that no bargain or agreement was made for any sum to be paid to James Hyde for such service, James Hyde saying, as they could not tell what time it would take, no sum could be fixed." Now, I am asked to consider this as an agreement, by the Counsel on behalf of the gentleman who swears that no bargain was made. Can I infer, from any of these statements, that any specific agreement was made at all? The Counsel, who took all the pains he could on behalf of the owners of the ship, said they were ready to pay, but not for a salvage service; and at last it dwindled down, in the expression of Dr. Robinson, to "a sort of understanding." That will not bar a claim for salvage. In order to bar such a claim, there must be a distinct agreement between the parties for a given sum, and in explicit terms.

But there is a great deal more. All this is done with one individual, James Hyde. Though I should be reluctant to hold that he was not competent to bind his people, yet there is nothing to convince me that they were cognizant of, or went out in the belief that he had made, a particular agreement with Mr. Pope. It is singular enough that, at

JAN. 29.

*William
Lushington.*

JAN. 29.

*William
Lushington.*

the conclusion of his affidavit, this gentleman says, "Although no agreement or understanding as to the compensation or remuneration for the services to be rendered was made, yet, in reply to a question respecting remuneration, James Hyde said that, as they could not tell what time it would take, the sum could not be fixed." Here is this individual repeating that the sum was to be left undetermined, but he denies that any understanding existed that they were to be paid salvage, or that salvage was alluded to. Suppose it was not, we must look to the service itself which was performed. I have not a shadow of a doubt that this was a salvage service, and assuredly there was no agreement that could bar the parties.

No agreement
that would bar
a suit.

The suit is not brought by Mr. Hyde himself, who, for reasons satisfactory to his mind, thinks proper not to come forward and assert any claim for the service so performed. It is not a service of very high character; it was performed at a time when the weather was moderate; there was no very great exertion; and, looking at all the circumstances, and estimating the value of the property at from £2,400 to £2,500, I think £120 is not an extravagant sum.

Salvage de-
creed.

Proctors:—*Smale* for the salvors; *Deacon*, for the owners.

Add.CourtDay.

FEBRUARY 9.

Collision,
near Flamboro'
Head, at night,
between two
vessels, very
near before they
saw each other,
both close-
hauled, on dif-
ferent tacks,
that on the lar-
board tack, a
light vessel, go-
ing to the N.,
having ported
her helm and
eased off the

THE "LADY ANN" (HARMAN).—*Cause, by Act on Petition.*—This was a cause of damage by collision, by the owners of the late schooner *Hope*, 114 tons, against the schooner *Lady Ann*, 75 tons, to recover for the loss of the former vessel. On the part of the owners of the *Hope*, the Act alleged that the vessel was on her voyage from Shoreham to Hartlepool, when, about eight P.M. on the 14th February, being about nine miles to the S. of Flamborough Head and about four miles from the land, lying close-hauled on the larboard tack, under double-reefed mainsail, reefed topsail, jib and foresail, going about six knots, the night dark and cloudy, and the wind blowing hard

from the W.N.W., one of her seamen being in her bows, keeping a good look-out, the *Lady Ann* was observed ahead, distant about 200 yards, approaching the *Hope*, close-hauled on the starboard tack; that the master and crew of the *Hope* were on deck, and, upon seeing the *Lady Ann*, one of the crew hailed the master of the *Hope* that there was a vessel ahead, and the master immediately ordered the *Hope's* helm to be put hard a-port, which was immediately done, and the mainsheet was eased off; that the master and two of the crew went forward and hailed the *Lady Ann* to keep her luff, but no answer was received, nor was any light shown; that immediately afterwards the *Lady Ann* struck the *Hope* on the larboard bow, and she sank in about ten minutes, the master and the mate being drowned, the rest of the crew being saved and taken on board the *Lady Ann*; that the collision was caused solely through carelessness or mismanagement and want of nautical skill on board the *Lady Ann*, and that, had that vessel kept her luff, as she ought and was bound to have done, the same would not have occurred.

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mainsheet, and that on the starboard, a loaded vessel, having kept her luff: — Held, that the light vessel did all she could have done, and that the loaded vessel, not having, when danger of a collision appeared, ported or adopted any measure to avoid it, was solely to blame.

The Answer, on the part of the *Lady Ann*, alleged that that vessel was on a voyage from Middlesborough to London, with a cargo of iron and coke, when, at about nine (not eight) P.M., of the 14th February, the wind blowing heavily from the W. (not W.N.W.), the schooner being under double-reefed mainsail, two-reefed topsail, and reefed foresail, jib and staysail, her head S., closehauled to the wind on the starboard tack, and sailing at less than four knots, all hands on deck keeping a good look-out, the night dark, though vessels could be seen about half a mile from each other, the *Hope* (in ballast), her head N.N.W., was seen from the *Lady Ann* about three points on her larboard bow, distant about half a mile, and approaching her; that the *Lady Ann* steadily kept her luff; but the *Hope*, instead of giving way, which was her duty, kept on in a direction to cross the *Lady Ann's* hawse, and that it was only on finding (after having partially crossed the *Lady Ann's* hawse) that she could not clear her, and was too close to her to avoid a collision, that the helm of the *Hope* was put hard

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a-port, in consequence of which she came round with her head to about N.E., but in so doing she carried away the bowsprit of the *Lady Ann*, and did her other damage, shortly after which the *Hope* sank; and that the collision was imputable solely to the *Hope* for not bearing away in time.

A cross-action was entered on behalf of the *Lady Ann*.

The Court was assisted by two Elder Brethren of the Trinity House.*

Dr. Bayford and *Dr. Deane* for the *Hope*; *Dr. Addams* and *Dr. Twiss* for the *Lady Ann*.

SUMMING UP.

DR. LUSHINGTON (*addressing the Elder Brethren*):—

Gentlemen: One of the consequences which have unfortunately resulted from this collision is the death of the master and mate, whence it has happened that the case is deprived of their evidence, which might have been very material in elucidating some of the circumstances.

It is right I should state to you, that it is impossible for the parties suing to succeed in the cause unless they shall be able to make out, by the evidence they produce, that the *Lady Ann* was to blame, or unless this is to be inferred from the statements on behalf of the *Lady Ann* herself, and the evidence adduced by her owners. I mention this, because, if it so happens, as in this case, that, where a collision has occurred, and some of the persons on board one of the ships have been lost, we cannot supply their testimony by inference; we must rely solely upon the evidence in the cause.

Case of the
Hope.

There are two points of view in which this case has to be considered: first, the measures which were pursued on the part of the *Hope*; secondly, what was done on the part of the *Lady Ann*. According to the statement of the *Hope*, she was bound from Shoreham to Hartlepool, and when the collision took place, on the evening of the 14th of February last, she was about nine miles to the S. of Flamborough Head, and about four miles from the land, lying close-

* Captain Nelson and Captain Farrer.

hailed on the larboard tack, under double-reefed mainsail, reefed topsail, jib, and foresail, and was going about six knots through the water. The night was dark and cloudy, and the wind blowing hard from the W.N.W. There is a difference between the statements as to the quarter from which the wind was blowing. It is impossible to define with accuracy from whence it blew, but it may be taken midway between the two statements. Probably you will come to that conclusion when you have to form your opinion. The Act on Petition on behalf of the *Hope* goes on to allege, "James Strange was then in her bows, keeping a good look-out, when he discovered another vessel, the one now proceeded against, ahead of the *Hope*, and distant about 200 yards; that the *Lady Ann* was then approaching the *Hope*, close-hauled on the starboard tack." So that, according to this representation, both the vessels were close-hauled, one on the larboard, the other on the starboard tack. It then goes on to allege that, on seeing the *Lady Ann*, "George Strange, one of the *Hope's* crew, hailed the master that there was a vessel ahead; that the master immediately ordered the *Hope's* helm to be put hard a-port, and that the same was immediately done by Thos. Broadbridge, the mate, who was then at the helm, and that Wm. Burtenshaw, one of the crew, eased off the mainsheet; that the master and two of the crew went forward, and hailed those on board the *Lady Ann* to keep her luff." This statement, so far as it goes, is supported by the affidavits of the surviving crew; and assuming that you believe them to be true, then I apprehend it follows that every measure was pursued by those on board the *Hope* which was fit and proper for them to take. Being on the larboard tack, and meeting a vessel on the starboard tack, close-hauled, it was the duty of those on board the *Hope* to give way, and they attempted to carry it into effect, by porting the helm and easing the mainsail. On behalf of the *Lady Ann*, it is alleged that, though these measures were pursued on the part of the *Hope*, yet they were not adopted with that expedition necessary to avoid the collision. It will be for you to form your opinion whether the statement in this respect be

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Lady Ann.

or be not true. It was argued by Dr. Addams, and as I think with considerable weight and truth, that the remainder of this Act does not contain a direct statement, a straightforward pleading, as it ought, as to the cause of the collision. It is not directly averred on behalf of the *Hope*, though it is insinuated, that the master of the *Lady Ann* admitted that he had starboarded his helm. There is not the slightest proof of it, therefore you may dismiss such a circumstance—such an insinuation, if so it may be called—from your minds. The ground of the collision is stated in these words: “The collision is not imputable in any manner to any misconduct of those on board the *Hope*, but was caused solely through the carelessness or mismanagement and want of nautical skill of those on board the *Lady Ann*, and, had the *Lady Ann* kept her luff, as she ought, and was bound to have done, the same would not have occurred.” That is a very awkward mode of pleading, undoubtedly; for it ought to have been alleged, if they intended to place the case on that footing, that the *Lady Ann* did not luff, as she ought to have done, instead of pleading it as it has been pleaded.

These are the averments on the part of the *Hope*. Your first consideration will be, whether she was to blame. If the *Hope* was at all to blame, it could only be by reason of delay; but it does not appear to me that there is anything which shows that the measures she took were not pursued with due alacrity: I see no reason to suppose it.

Case of the
Lady Ann.

The statement on behalf of the *Lady Ann* is, that she was proceeding from Middlesborough to London, with iron and coke. The wind is represented by her to have been blowing W., and she was reaching up with her head S., close-hauled to the wind on the starboard tack. She states that, though the night was dark, yet vessels could be seen half a mile from each other. They then go on to allege that, in this state of things, they descried the *Hope*, “close-hauled to the wind on the larboard tack,” so that both vessels agree they were close-hauled, “sailing at the rate of about seven knots an hour, with her head N.N.W., about three points on her larboard bow, distant about half a mile, and approach-

ing the *Lady Ann*; that the *Lady Ann*, as she was bound to do, steadily kept her luff; but that the *Hope*, instead of giving way, which was her duty, kept on in a direction to cross the *Lady Ann's* hawse." I do not altogether perceive how that was practicable, but so it is said. "That it was only on finding (after having, partially crossed the *Lady Ann's* hawse) that she could not clear her, and was too close to her to avoid a collision, that the helm of the *Hope* was put hard a-port; that the *Hope*, in consequence of her helm being thus put hard a-port, came round with her head to about N.E.," and the collision took place. I need not enter into the effects of the collision. Now, Gentlemen, you will observe that it is distinctly averred, on the part of the *Lady Ann*, in this plea, and it is supported by all the affidavits, that she kept her luff, as those on board conceived they were bound to have done, and they adopted no other measures whatever. The whole blame and cause of the collision is imputed to the *Hope*, on account of dilatoriness in taking the steps which, they say, she ought to have taken at an earlier period.

The result appears to come to this—taking the statements of the *Lady Ann* to be true—from the beginning to the end, she kept her luff. Are you of opinion that that was the right measure for her to pursue; or are you of opinion that anything else ought to have been done to avoid the collision? Because, if the vessels were approaching each other, and either of them did not adopt the measures which ought to have been taken to avoid the collision, then, undoubtedly, blame must rest on the vessel which omitted to do what could and ought to have been done.

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Questions.

CAPTAIN NELSON.

OPINION.

In the first place, both vessels allow that they were upon a wind. If either had an advantage, it was the loaded vessel. The fact is, the ships were very near before they saw each other; but they had sufficient time, if they had acted with due nautical skill, to have avoided the accident. The light vessel, going to the north, did all she could do.

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As soon as they saw the other vessel, they put the helm to port; the ship answered her helm, and she payed off four points to the wind, which would take some time. They assisted the helm all they could by easing off the mainsheet. That was all that could be done. With respect to the vessel coming from the north, there can be no doubt the master was near the helm, and there was plenty of time to have ported it,—to have done what they ought to have done to keep clear; but they did not do it. The *Lady Ann* was kept steadily on; she was not hauled closer to the wind if the wind would allow it, nor was the helm altered, although they saw an accident would inevitably happen. There was a man on the look-out, and he ought to have eased off the mainsheet, to assist the helm; but they neither did the one nor the other. My brother Farrer thinks with myself that there was great want of skill on the part of the loaded ship; therefore she was to blame.

JUDGMENT.

PER CURIAM.

I pronounce for the *Hope's* damage, and dismiss the cross-action, with costs.

Form of pleading.

In this case, a great deal of difficulty occurred to the Court in consequence of the mode of pleading adopted. It is very desirable that parties—particularly when they commence a suit for collision—should furnish Proctors and Advocates with sufficient knowledge to enable them to draw up the pleas with great precision. It is quite evident in this case that the point on which it has hinged has never been touched upon at all in the pleadings. I very much doubted whether I was at liberty, under the circumstances, to pronounce the decree which I have; but, after great consideration before I came into Court, and on consulting with the Trinity Masters, I found that their opinion was so clearly that those on board the *Lady Ann* must have known what their duty was, and that they ought to have ported their helm, that I did not think, especially in a case of this kind, that I was at liberty to refuse to do what was real justice in the case. [*Bayford*.—The difficulty in settling the Act on

Petition arose from the parties being first in one place and then in another. The Act was settled provisionally ; it was intended to obtain further information, but that turning out impossible, from the crew being scattered, the Act was obliged to remain in its present condition.] The fact of the *Lady Ann* not porting her helm and easing off her mainsheet does not appear in the case at all.

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Proctors :— *Coote*, for the *Hope* ; *F. Clarkson*, for the *Lady Ann*.

DECEMBER 7, 1836.

THE “IX OF MARTZ.”—This was a cause of damage, in which *IX of Martz*. the owners of the brig *Carnation*, of 281 tons, sought to recover the loss sustained in a collision with the Prussian vessel *IX of Martz*. The Act on Petition alleged that the brig, with a cargo of coals, bound from Newcastle to Cronstadt, on the 9th September, 1835, anchored in the Sound, below Elsinore, at the entrance of the Baltic Sea, and on the following day weighed anchor, and endeavoured to beat through the Sound against a strong current (the wind being variable), until the 16th, when she succeeded in passing Elsinore, with several ships in company, and continued beating into the Baltic against a foul wind until the 20th, when she got past Copenhagen ; that, on this day, there was a fresh breeze from the S., with clear weather, and at 4 P.M. the *Carnation* was plying to the S. ; that, at about 4.30, she was reaching to the S.W., on the larboard tack, Steven’s Head bearing S.W., there being a good look-out kept, several vessels being in company, and amongst others the brig *IX of Martz*, bound from Newcastle to Swinemunde, in Prussia, with coals, which was reaching to the E. on the starboard tack, and coming close up to the *Carnation*, the wind blowing strong S. by E. ; that the crew of the *Carnation*, observing that there was great danger of the two ships not going clear of each other, she was hove about, in expectation that the *IX of Martz* would keep her reach, or go about, instead of which, she put her helm a-weather, to go under the stern of the *Carnation*, but not doing so in time, she ran foul of the *Carnation*’s starboard side, with full force, doing her so much damage that she was obliged to put into Copenhagen to repair, and was not able to recommence her voyage to Cronstadt until the 15th

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October, in consequence of which delay, on her return voyage, she was frozen in and compelled to winter there until April, 1836. On the part of the foreign owner of the *IX of Martz*, it was alleged that, on the 19th September, the wind blowing from the S., with a northerly current, and clear weather, the pilot quitted the vessel outside of Dragoe, when she beat up towards the land as far as Steven's Land, and at 4 P.M. tacked from the land and stood on the starboard tack, it blowing fresh from the S., and the weather being hazy, with rain; that shortly afterwards the *Carnation* was observed on the larboard tack, standing towards the *IX of Martz*, and that vessel not offering to bear up, the master of the *IX of Martz* put her helm a-lee, but owing to the sea, she missed stays, and (the *Carnation* being then under the lee of the *IX of Martz*) fell on board of her, and the *Carnation*, being already thrown in the wind, was not put in stays, and the vessels remained foul of each other for about an hour.

The Court was assisted by Captain Young and Captain Wellbank, from the Trinity House.

The *King's Advocate* and *Dr. Addams*, for the *Carnation*; *Dr. Phillimore* and *Dr. Haggard*, for the Prussian vessel.

SUMMING UP

SIR JOHN NICHOLL.

In this case, before I apply to these gentlemen for their opinion, there are one or two observations upon the case which I think it proper for the Court to make.

These two vessels were trying to get out of the Sound into the Baltic, with an adverse wind, and each was beating to windward. It is admitted that one of the vessels, the *Carnation*, was on the larboard tack, and that the Prussian vessel was on the starboard tack. They were approaching each other, and there was a probability of a collision between them. The affidavit of the master, mate, and five seamen of the British ship, on the part of the plaintiffs, states that, "at 4 P.M. of the 20th September, the *Carnation* was plying to the S., and at about half-past 4 the ship was reaching to the S.W. on the larboard tack; that, at the same time, there were several vessels in company, and amongst others the brig *IX of Martz*, which was reaching to the E., on the starboard tack, and coming close up to the *Carnation*, the wind at such time blowing strong S. by E.; that the deponents and the rest of the crew of the *Carnation* having observed that, in consequence of this proceeding on the part of the *IX of Martz*, there was great danger of the two ships not going clear of each other

they hove the *Carnation* about, in expectation that the *IX of Martz* would keep her reach, or go about; instead of which, she put her helm a-weather, to go under the stern of the *Carnation*, but not doing so in time, she ran foul of the *Carnation's* starboard side, with full force." From this statement it does not appear when or at what distance they first saw each other; but I am told that it was not until they were close together, and there was no possibility of avoiding a collision. But there is another affidavit from two apprentices belonging to the *Carnation*, Crass and McKinley, and their statement is, that, "about half-past 4 P.M., the *Carnation* was reaching to the S.W., on the larboard tack, when the deponents saw the *IX of Martz* at the distance of about half a mile to the leeward of the *Carnation*, and reaching to the E. on the starboard tack." So that they saw her half a mile off, the *Carnation* being on the larboard tack and the other vessel on the starboard tack; and this is admitted in one of the plaintiffs' own affidavits. In this state of things, one vessel being on the larboard tack and the other on the starboard, and the vessels being seen from each other half a mile off, it is acknowledged to be the rule of navigation, and I shall hold it to be so, unless these gentlemen say it is not the rule, that when two vessels are on contrary tacks, the duty of the vessel on the larboard tack is to give way, and the duty of the vessel on the starboard tack is to keep her course: there was ample time, it being daylight; and if this had been done, no collision would have taken place. These gentlemen have read the affidavits, and are aware of the rules of the sea, and will be able to decide which party has given the true account. I beg, therefore, to ask your opinion which vessel was to blame, and what was the cause of the collision. There has been considerable loss and damage in this case, which is an unfortunate case, but the Court must act according to the principles of justice.

(After consultation.)

These gentlemen are clearly of opinion that the blame is attributable to the *Carnation*, in not bearing up in time, and in attempting to go to windward of the foreign vessel. The *Carnation*, being on the larboard tack, should, in accordance with common usage, in the first instance, have bore up and given way.

(The foreign vessel dismissed, with costs.)

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Lady Ann.

OPINION and
JUDGMENT.

Prerogative Court of Canterbury.

Bye-Day.

FEBRUARY 26.

Signature of the deceased not at the foot or end of the will. IN THE GOODS OF JOSHUA MINTY, DEC.—*Motion, ex parte.*—The deceased died 27th December, 1849, having executed his will (disposing of the whole of his property), in the presence of two witnesses, on the 15th of that month. The will was written with his own hand on a sheet of foolscap paper, the dispositive part being contained in the first side of the sheet, the *testimonium*-clause and date bringing it down to within an inch of the bottom of the page. After the date, a blank space, sufficient for about two lines of writing, followed, and then commenced the attestation-clause, “signed by the said testator as his last,”—with this line the writing on this side or page ended, and it was continued at the top of the second side—“will and testament, in the presence of us, present at the same time, who, at his request, in his presence, and in the presence of each other, have subscribed our names as witnesses.” Immediately under this clause was the signature of the testator, and below, on the left hand, were the names of the witnesses. In the affidavit of the witnesses, one of them, Mr. John Pyle, deposed that he was the medical attendant of the deceased, whom he visited professionally on the day the will bears date, on which occasion, the deceased (then confined by the illness of which he died) produced to him his will, in the presence of the other witness, and requested the deponent would see him sign it, inquiring of the deponent where he should sign his name, to which inquiry the deponent replied, that, “from having recently witnessed the execution of a will, he knew it was requisite that the same should be signed at the end thereof, and that consequently the will must be signed on the second page, where the same concluded, which the deceased accordingly did.”

Dr. R. Phillimore moved for probate, citing *Re Whittle*.*

* *Antea*, p. 291.

SIR H. JENNER FUST.

I am of opinion that the signature in this case is not at the foot or end of the will, according to the Statute. It may be very difficult to lay down any specific rule or principle,—each case must depend upon its own particular circumstances,—as to when the attestation-clause is a continuation of the will. If, in this case, the attestation-clause had followed the date, without any blank space, the Court might hold, as it has held,* that the signature was at the foot or end of the will; but I am not aware of any case, where a blank space has intervened, when it was held that a signature under the attestation-clause was a compliance with the Act of Parliament. In the present case, I am of opinion that there has not been a compliance with the Act, and that I must reject the Motion, leaving the parties to propound the paper, so that they may be able to take the opinion of the Superior Court. No principle can be extracted from any decision of that Court, except in the case of *Smee v. Bryer*,† where the will was written upon three sides of a sheet of foolscap paper, and the writing came very nearly to the bottom of the third side, and there was very nearly, not quite, room for the signature of the deceased and the names of the witnesses, if there had been no formal attestation-clause, which was written on the fourth side, and the signature of the deceased was nearly in the middle of that side, no part of the will being immediately above it; and it was held that that was not a due compliance with the Act, their Lordships observing that the Legislature must be understood to have deemed it best to run the risk of sometimes defeating the intentions of testators, by requiring a compliance with forms, as a less evil than that which might arise from giving validity to wills made without forms.

I am of opinion that this will is not signed at the foot or end, within the meaning of the Act of Parliament; I reject the Motion, leaving the parties to propound the paper.

Tatham, Proctor.

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Minty, dec.

DECEASED.

* Ex. gr. *Re Batten*, ante, p. 289.

† 6 Notes of Ca. Supp. xli.

FEB. 26. IN THE GOODS OF ANNE SMITH, WIDOW, DEC.—*Motion,*

Signature of
the deceased
not at the foot
or end of the
will.

ex-parte.—The deceased died 28th January, 1850, leaving a will, which disposed of the whole property, written on a sheet of note-paper, ending, on the middle of the second side, “witness my hand and seal this 23rd day of April, 1847.” Then, a blank space of about an inch intervening, the signatures of the deceased and of the witnesses appeared as follows:—

Witnesses

G. Bateman

Ann Chase (Anne  Smith.

MOTION.

Dr. Haggard moved for probate.

DECREE.

SIR H. JENNER FUST.

Here is a considerable space left unoccupied, before the signature of the deceased, for what purpose I cannot understand. Where the witnesses' names are placed is of no importance; but the signature of the testatrix must be at the foot or end, and I do not see that it can be so considered in this case.

Motion rejected.

W. Townsend, Proctor.

Signature of
the deceased
not at the foot
or end of the
will.

FEB. 26. IN THE GOODS OF SARAH BEADON (WIFE OF VALENTINE BEADON), DEC.—*Motion, ex-parte.*—The deceased, in exercise of a power of appointment under her marriage-settlement, made her will in conformity thereto, which concluded, “in witness whereof I hereunto set my hand and seal at Richmond this first day of September, 1848, in the presence of the subscribing witnesses.” A blank space of nearly two inches intervened between this and the signature and seal of the deceased, under which were the names of the subscribed witnesses.

MOTION.

Dr. Addams moved for administration with the will annexed to the husband.

DECREE.

SIR H. JENNER FUST.

I must reject the Motion.

Crosse, Proctor.

IN THE GOODS OF LEWIS HENRY (OTHERWISE LOUIS HENRIE) SHADWELL, ESQ., DEC. — *Motion, ex-parte.* — The deceased, a barrister of the Middle Temple (son of the Vice-Chancellor of England), died 9th December, 1849, leaving a will (disposing of the whole property), dated 3rd July, 1848, written with his own hand upon a sheet of note-paper. It commenced, on the first side: "Lincoln. This is the last will of Louis Henrie Shadwell;" the testamentary part ending on the second side, about an inch and a quarter from the bottom of the page (the writing on the first side being brought down close to the bottom), the concluding words on that page being the appointment of executors; on the third side, commencing at the top, were the words, "Signed by me in the presence of the undersigned." Immediately under this was the signature of the deceased, and then followed "Witnessed by us, in the presence of the testator and each other, July the third, 1848. J. M., E. M." From the affidavit of the witness J. M. (Court-keeper to the Vice-Chancellor of England), it appeared that, on the forenoon of the day the will bore date, the deceased called at the private door of the Vice-Chancellor's Court, and told the witness he wanted him and his daughter to see him sign a few papers; that the deceased thereupon went into the Vice-Chancellor's private room, followed by the witness and his daughter, and, no one else being present, took out three (if not four) papers, all of the same size and description (the contents of which the witness did not know), and, sitting at the Vice-Chancellor's table, and laying one of the papers before him, he placed another paper so as to cover the second side, and told the witness and his daughter that they had "only to see him sign his name there," pointing to the top of the third side, and to write their names under his; that the deceased then wrote the words "Signed by me in the presence of the undersigned," and signed his name in their presence; he then wrote "Witnessed by us in the presence of the testator and each other, July the third, 1848," and the witness and his daughter then signed their names; that when the first paper was so completed, the deceased put it aside on another

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Signature of
the deceased
not at the foot
or end of the
will.

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table, and proceeded to sign the others successively, in like manner, and they were respectively attested by the witnesses in like manner. The four papers thus executed were wills of precisely the same tenor, bearing the same date, and written in the same way, each having the same space left at the bottom of the second side.

MOTION.

Dr. R. Phillimore moved for probate.—There is a very small blank space on the second side, in which it is just physically possible that the deceased might have placed his signature; but there is no room for that and the attestation of the witnesses too, and it would be cruel to set this will aside, under the Act. The deceased was a lawyer.

DECREE.

SIR H. JENNER FUST.

There is ample space for the signature of the deceased at the bottom of the dispositive part of the will; the question is, whether the place of the signature is at the foot or end of the will. I cannot say that it is so. It may be very cruel to refuse probate of this paper, and may be contrary to the opinion of this gentleman himself, and perhaps of other lawyers; but I am afraid, according to the doctrine held by this Court and the Superior Court, this will is not signed at the foot or end. There is no part of the will immediately above the signature of the deceased (as stated by the Judicial Committee, in *Smee v. Bryer* *), and I am sorry to say, I cannot consider the signature to be at the foot or end of the will, on mere *ex-parte* Motion. I must reject the Motion, and leave the parties to propound the paper.

Motion
 rejected.

Bowdler, Proctor.

Administra-
 tion, with copy
 of a Scottish
 will, granted in
 conformity to
 the practice of
 the Court of
 Scotland.

IN THE GOODS OF HELEN HENDERSON, SPINSTER,
 DEC.—*Motion, ex-parte.*—The testatrix, late of Aberdeen,
 N.B., died 18th October, 1848, domiciled in Scotland,
 leaving an informal will, without date, wherein no execu-
 tor is named, but at the end, the residue is disposed of,

* 6 Notes of Ca. Supp. xli.

one-half to her nephew, J. F. L., and the other half to the children of her late niece, J. W. T. The will commences thus: "My dear sister, as I have left no will or testament, knowing that my wish will be attended to, I therefore say what I should like done with my small effects. I have only the £450 that is settled in India and the £400 in bond on A. H.'s property, and my house in, &c., and my half of the one in, &c., all of which I wish you to live rent [*sic*], and in case of your death to be divided as I shall hereafter name;" and then followed various pecuniary and specific legacies and the residuary bequest. Confirmation of the will had been granted by the Commissary Court of Aberdeen to the sister and only next of kin of the deceased, whereby she was appointed executrix dative *quod* nearest in kin to the deceased, who possessed no property in which she had a beneficial interest within the province of Canterbury, but inasmuch as there was invested in her name in trust £500 of the Book Debt Loan of the East-India Company, it was necessary to obtain a representation to the testatrix by the authority of this Court.

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Henderson, dec.

Dr. Robertson moved for administration, with a copy of Motion. the will from the Court at Aberdeen annexed, to the sister and only next of kin, without requiring the renunciation of the residuary legatees, citing (as containing the principle of grants of administration with foreign wills) *Larpent v. Sindry*;* *Re Cringan*,† and *Viesca v. D'Aramburu*.‡

SIR H. JENNER FUST.

DECEASED.

The Court has no difficulty in acceding to this Motion. There might be a doubt whether the sister was or was not executrix; but the Court in Scotland has put an interpretation upon the will, and has granted confirmation of the will to the sister, whereby she was appointed executrix dative *quod* nearest in kin to the deceased. Let the Administration pass.

Administration decreed.

Farquhar, Proctor.

* 1 Hagg. E. R. 382.

† 1 Hagg. E. R. 548.

‡ 2 Curt. 277.

FEB. 26. DIMES v. CORNWELL AND LYON. — *Motion*. — Mr. Ed-

A residuary legatee, who had renounced administration *de bonis non* of an estate alleged to be insolvent, allowed to retract her renunciation, and to take administration, in preference to the nominee of creditors representing a large amount of debt.

mun-
d Waters, the deceased in this cause (the well-known proprietor of the Opera House, but late of Calais, in France), died the 18th October, 1839, having made his will, with a codicil, whereof he did not appoint any executor or residuary legatee in trust, but therein named his three sons and his daughter, Mrs. Hind (wife of G. W. Hind), together with his grandsons, W. Cornwell and G. F. Cornwell, residuary legatees. In December, 1839, administration, with will and codicil annexed, was granted to R. L. Waters, a son of the deceased and one of the residuary legatees named in the will, who for some time intermeddled with the effects, and died in September, 1848, leaving some part unadministered, having made his will, appointing his wife sole executrix and residuary legatee. In April, 1849, the other two sons and the daughter (Mrs. Hinds) having renounced administration *de bonis non*, a Citation issued at the instance of Mr. W. Dimes, a creditor of the estate of the deceased in the sum of £40, against Messrs. Cornwell, the other residuary legatees named in the will, calling upon them to accept or refuse administration of the unadministered goods of the deceased, or show cause why the same should not be granted to him, Mr. Dimes. In May, 1849, before the return of this Citation, a Citation issued at the instance of Mr. J. W. Lyon, alleging him to be a creditor in the sum of £16,079, against Messrs. Cornwell and also against Mrs. Waters, widow of Mr. R. L. Waters, calling upon them to accept or refuse administration, or show cause why the same should not be granted to him, Mr. Lyon. An Act on Petition having been entered into between the Proctors of Mr. Lyon and Mr. Dimes, the Proctor for the former tendered to the Proctor for Mr. Dimes the amount of his debt, with costs, which was refused by the latter, who contended that he had, in effect, a Decree in his favour. At the hearing of the Petition, the Court directed the matter to stand over, intimating that some third person, being a creditor, might be selected and approved by the contending parties to administer the estate. The Proctor for Mr. Dimes protested of a grievance and of appealing, and

1849.
Nov. 27.

was assigned to prosecute his appeal by the 5th of December.

Creditors interested to the amount of £63,179 consented by proxy to the nomination of Mr. W. Lovell, himself a creditor in the amount of £1,200, as administrator of the unadministered effects, on whose behalf application was about to be made to the Court, when Mrs. Hind applied to be allowed to retract her renunciation, and to take administration *de bonis non*.

Sir J. Dodson, Q.A., in support of the application; Dr. Harding, *contrà*.

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*Dimes v.
Cornwall.*

SIR H. JENNER FUST.

JUDGMENT.

This is an application by one of the residuary legatees to be allowed to retract her renunciation of the administration, and it is opposed by a person nominated by creditors stated to represent debts amounting to £63,000. According to the practice of the Court, the residuary legatee would be allowed to retract her renunciation. A creditor is entitled to the grant only when no other person has a preferable interest; and it cannot be said that a residuary legatee has not such interest. Part of these debts may be contested (the estate is said to be insolvent); but if not, I cannot say that the case is so clear that the Court can exclude the residuary legatee in favour of a creditor who claims the grant on the ground of her renunciation. I am not prepared to say that the residuary legatee is not entitled to retract her renunciation. A creditor cannot take but on the renunciation of the legatee, and she applies to retract her renunciation. I am of opinion that the residuary legatee is entitled to administration, with will and codicil annexed, *de bonis non*, and I decree administration to her upon her retracting her renunciation.

Administra-
tion to the
legatee.

(No order as to costs.)

Proctors:—*Glennie*, for Mrs. Hind; *Poynter*, for the creditors.

Feb. 26. IN THE GOODS OF JOSEPH THOMAS TREFFRY, DEC.—

The nomination of executors in trust according to the tenour, contained in a will disposing of real and personal property, revoked by a codicil, substituting other executors, under circumstances which rendered a renunciation by the displaced executor advisable.

Motion, ex-parte.—The testator, who died 29th January, 1850, left a will, dated 9th January, 1841, with a codicil, dated 6th April, 1846, all in his own handwriting, and duly executed. By his will, he devises his real estates, together with a certain advowson, to his trustees, John Lowe and John Wallis, and their heirs, upon trust for the use of E. J. W., and his assigns for life, “provided that his said trustees, before E. J. W. receives any pecuniary benefit therefrom, shall have paid all his (testator’s) debts and obligations, including the fulfilment and completion of all his existing contracts and devises thereafter-mentioned, and shall have otherwise fulfilled his intentions and completed such works as he should be prosecuting at the time of his death, and after the decease of the said E. J. W., and subject to payment of his debts and fulfilment of his contracts, to the use of the eldest son of E. J. W. for life, with remainder to his other sons, and with divers remainders over.” The testator further declares that, “before any one therein named should be entitled to any rents, profits, or other emoluments from his estates, his will was, that out of such rents and profits all his debts and all incumbrances on the estates should, by the said John Lowe and John Wallis, and their heirs, be paid and discharged, as well as all his contracts completed, and the properties respectively paid for.” And he further directs that, “if there should be any debt due on his estate at the time of his death, his trustees, after applying the rents and profits for the payment of the interest on such debt, should be at liberty, should such rents and profits be insufficient to discharge the same, to do so from the profits of his mines or other property.” And he further appoints the said John Lowe and John Wallis executors in the words following: “Lastly, after the death of my mother, the payment of all my debts and obligations, and the fulfilment of all my contracts, those now pending or which I may hereafter make, my will is, that the said John Lowe and John Wallis, and their heirs, shall, *after duly proving my will as executors in trust, which I hereby make and appoint them* [the words in italics, interlined, with the

testator's initials, are amongst the alterations recited in the attestation], pay over or yield up all the rest and residue of my chattel property, money, and effects unto such person as then may be entitled under this my will to the use for the time being, and the rents, and profits, and issues of my estate as hereinbefore limited." Mr. Lowe, one of the executors and trustees, died subsequently to the date of the will.

The codicil commences immediately after the will, and is written partly under the end of the will, and partly on the margin of the first page of the will : it is signed by the testator on the first side as well as at the end. It commences " Place, April 6, 1846," and contains a disposition of the residue of the testator's chattels " which may remain after his trustees should have paid all his debts." He declares that that part and what was written on the other side he made " as a codicil." The continuation of the codicil, written in the margin of the first page of the will, commences as follows : " Place, April 6, 1846. The following additions, or alterations, or codicil to my will I make partly in consequence of the death of one of my trustees, and the ill health of the other, and I hereby appoint in their stead to be the trustees of this my will and codicil Thomas Cabbell, of the Middle Temple, in the City of London, Esquire, and James Henry Meredith, of Stonhouse, in the county of Devon, Esquire ;" and the testator thereby gives and devises to them all his real estates and other property, to enable them to carry out his intentions " in the same way as in this will he has appointed John Lowe, Esquire, and John Wallis, clerk ;" and further, he bequeaths to the said John Wallis £500, " being the same sum which he would have had if he had executed the trusts of his will."

Mr. Thomas Cabbell died in the testator's life-time. The personal property is of the value of about £100,000. The question was, whether Mr. Wallis's appointment was not revoked, and whether Mr. Meredith was not entitled to probate as the surviving executor substituted in the codicil.

Sir J. Dodson, Q.A., moved for probate of the will and *MORRIS* codicil to Mr. Meredith, as the surviving substituted execu-

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tor, according to the tenour of the codicil. The direction to pay his debts would constitute his trustees executors, and Mr. Wallis, in whose stead Mr. Meredith is appointed, was executor according to the tenour of the will.

DECREE.

SIR H. JENNER FUST.

Motion
 granted.

Messrs. Lowe and Wallis are expressly nominated in the will executors in trust, and they would, under the terms of the will, be executors in trust of the personal property, as well as of the real estates. The question is, what is the effect of the codicil? He thereby recites that he had by his will appointed Messrs. Lowe and Wallis trustees, and I cannot but consider that he had appointed them executors according to the tenour as to the real and personal property; and looking at the whole tenour of the disposition of both the real and the personal property, I consider that, by the codicil, Messrs. Cabbell and Meredith were substituted for Messrs. Lowe and Wallis, who had been appointed executors according to the tenour by the will, and whose appointment as such is recited by the codicil. Under these circumstances, I am of opinion that the appointment of Mr. Wallis as executor is revoked, and that Mr. Meredith is substituted for him, and therefore he is entitled to probate of the will and codicil, as surviving executor. But it may be prudent that Mr. Wallis should renounce, as a difficulty may hereafter arise, for the case is not altogether without difficulty.

Nicholl, Proctor.

Practice. — IN THE GOODS OF THOMAS TEED, DEC. — *Motion, ex-parte.* — The testator died in 1843, having duly executed his will, bearing date in 1837, whereof he appointed E. M., W. S., and his brother C. M. T., executors. By it he bequeathed the residue of his real and personal estate to his executors, in trust, whilst his daughter should be under twenty-one, and unmarried, to pay to his wife, for life, limited during widowhood, the whole of the rents and income

thereof for the maintenance of herself and their daughter, and on the latter's attaining twenty-one, or marrying under that age, upon trust thenceforth, during the life of his wife, or so long as she should continue his widow and unmarried, to pay to her one-half of the said rents and income; but in the event of and after her second marriage, then to pay her during her life an annuity of £500 for her separate use; and as to the other moiety of the said rents and income, or the whole thereof, after the second marriage of the wife, subject only to her aforesaid annuity of £500, in trust for his daughter. On the 12th April, 1844, Letters of Administration, with the will annexed, were granted to the widow, E. M. and W. S., two of the executors and residuary legatees in trust, having renounced, and C. M. T., the other executor and residuary legatee in trust (then in India), having been duly cited. The deceased's effects were sworn under £30,000; an Inventory was exhibited and the sureties justified. On the 2nd October, 1844, the widow intermarried with, and is now the wife of, Charles Lushington, Esq., M.P.; the daughter of the deceased is also married. There was no limitation of the grant, and Mrs. Lushington continued to administer the estate as far as she could; but it was found insufficient to pay the debts, and, on making up the accounts, with a view to applying to the Stamp Office for a return of the £480 paid for the duty on the grant of the Letters of Administration, the effects were found to exceed £30,000, and the Commissioners of Stamps, therefore, required that the Administratrix should be re-sworn; that there should be a fresh inventory and new security; and that the additional probate duty should be paid, before any part of the duty was returned. On the 11th December, 1849, Mrs. Lushington was re-sworn administratrix under £35,000. But it was objected in the Registry that the former grant was a *cessat* grant, and, consequently, that every thing done by Mrs. Lushington after her marriage was invalid.

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widowhood, and she married, continuing to administer the effects after her second marriage,—the Court held that the grant was not a *cessat* grant; but altered the practice in future, so that the grant in such cases should continue during widowhood only.

Dr. Addams.—I deny that this is a *cessat* grant. It is *MOTION*. not limited to the widow during widowhood; it is general in its terms. The only question is, whether the Court is

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called upon, *ex officio*, to declare the grant void. *Re Cassidy.**

DECREE.

SIR H. JENNER FUST.

This is a new case in its circumstances. The grant is in these words: "To Julia Jane Teed, widow and relict of the deceased, and one of the residuary legatees during life or widowhood named in the said will." There is, therefore, no limitation, these words being only a mere description of the legatee who is to take the grant; there is no limitation in the grant itself. As the estate is insolvent, no inconvenience would, perhaps, arise in this case if the Court were to hold that the administration ceased on the second marriage, and unless inconvenience would arise in other cases, the Court will direct that in future such grants of administration should be limited during widowhood, and if this grant had been so limited, it would have ceased on the second marriage, and I do not see why it should not be so. Unless, therefore, upon communication with the Registrar, I find that any inconvenience should suggest itself, I will direct that, in future, the grant of administration with will annexed, in such cases, shall follow the grant of probate of the will, and when made to the widow, as one of the residuary legatees, it shall be limited during widowhood. In the present case, under the special circumstances, let the Administration pass.

**Motion
granted.**

Tobbs, Proctor.

Inventory and Account.— **BAILEY v. BRISTOWE.—***Protest.*—This was a business of citing James Bristowe, Attorney of Olivia Bailey, widow, relict of a to bring in an Inventory and Account of the effects of deceased (resident abroad), Thomas Bailey, deceased, of Newfoundland, promoted by to whom Administration the said Olivia Bailey; to which Citation Mr. Bristowe had been granted appeared under protest, on the ground that it was not competent to this Court to require an Account between principal and agent.

* 4 Hagg. E. R. 360.

The Act on Protest alleged that, in 1835, Letters of Administration of the deceased's effects were granted by this Court to James Bristowe the elder (since deceased) and James Bristowe the younger, as the Attorneys of Mrs. Bailey, her to exhibit relict of the deceased, for her use, she then residing at New-I. and A., appeared under foundland, until she should apply for administration; that it is Protest, alleging that this Court had not jurisdiction to competent for her to obtain such administration, and thereby require an Account between her Attorney, or Principal and to appoint another; and that the acts of Mr. Bristowe, as Agent:—Held, that the Attorney was bound to exhibit I. and A., and his her Attorney, are in law to be considered as her acts. Protest overruled.

The Answer, on the part of the widow, alleged that Messrs. Bristowe had executed the administration-bond, whereby they covenanted to render an Inventory and Account, which had not been done; and, although frequent applications had been made on behalf of Mrs. Bailey to Mr. Bristowe, jun., for an account of the property of the deceased received and administered by him, he had neglected and refused to render the same, and had never accounted with her for any part thereof; and that it is within the undoubted jurisdiction of this Court to call for an Inventory and Account from all persons acting as administrators at the suit of any person having an interest.

The Reply submitted that the bond was executed by Messrs. Bristowe as the Attorneys of Mrs. Bailey, and that its true intent was to protect creditors and others having an interest in or claim against the estate, not to protect the interest of Mrs. Bailey against her own agent.

Dr. Bayford, in support of the Protest.—Mrs. Bailey **ARGUMENT.** should take the usual course of revoking the appointment of her Attorney, and apply for the administration herself. This is a case *primæ impressionis*. Such an attempt was never made before.

Dr. Jenner, in support of the Citation, referred to two instances in which Decrees had been issued, under the same circumstances, with the sanction of Sir John Nicholl.

SIR H. JENNER FUST.

Independently of those cases, I think that an Attorney, who takes an administration in the name of ano-

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Bristowe.*

ther, must still bring in an Inventory and Account. This Court was heretofore in the habit of requiring an Inventory and Account *ex officio*, and I am not aware that it has not that power now; but I am of opinion that the Court is bound, *ex debito justitiæ*, to call upon this party to exhibit an Inventory and Account. The widow has a right to have a *constat* of the funds in the hands of her Attorney (who gave the bond in his own name), in order to see what he has done with the funds; whether the debts have been paid or not, and what funds remain, before she takes upon herself the administration of the property, that she may determine whether she will take upon herself the administration or not. In the cases cited, the Administration ceased on the return of the party to England; this is a stronger case. It is said, the proceeding shows distrust: there may or may not be ground for distrust; but the Court would not refuse to interfere for the protection of the widow. I have no hesitation in overruling the Protest, and conderaning the party who appears under Protest in the costs; I assign him to appear absolutely, and to exhibit an Inventory and Account by the *Caveat* day next month.

Protest over-
ruled.

Proctors:—*Mundell*, for the widow; *Scirlock*, for the attorney.

A party, admitted a pauper, on a representation of facts by the Proctor assigned to him,—dispaupered.—The mere fact of a party not being worth £5 is not sufficient, where circumstances show his ability to carry on a suit, to entitle him to the privilege of suing in *formâ pauperis*.

LAIT v. BAILEY.—*Act on Petition.*—A suit under this title was depending in this Court, when the Proctor for William Lait, the party proceeding, having withdrawn, he (Lait) was admitted to sue in *formâ pauperis*, the Proctor for the other party waiving his objection. The Proctor assigned him prayed to be heard on his Petition, in objection to Lait being permitted to prosecute in *formâ pauperis*, and that the Court would dispauper him.

The Petition alleged that Lait, under the will of the deceased in the cause set up by the other party, dated 1829, took the devise of a freehold house, value several hundred pounds, and under the will set up by himself, dated 1830, he took a devise of a freehold house of considerable value, and also the residue of the deceased's property, amounting

to £300; that he might raise funds for carrying on the suit by mortgaging or selling the interest he had, whichever will be pronounced for; that he was in the receipt of a separate income of £40 per annum, arising from the rents of houses; that his wife and daughter are dressmakers, he participating in their income; and that he had, so late as September last, goods of some value.

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The Answer of the pauper (in the form of an affidavit) stated that he had sold his interest in the freehold house to one Wm. Pope; that it would be impossible to borrow money upon the residuary bequest in the will of 1830, no probate having been granted; that the rents of houses referred to are bequeathed to his wife independent of him; that although his wife and daughter endeavour to maintain themselves by needlework, their employment is so precarious as to be insufficient to procure for them all the necessities of life; and that he hath no goods or chattels whatever aforesaid.

The Reply of the Proctor alleged that the purchase of the freehold house by Wm. Pope was as the agent of Lait, who repaid him the deposit money; and that Lait completed the purchase on his own behalf.

The Rejoinder denied that Pope was Lait's agent in the purchase of the house, the reversion of which was rebought of him by Mrs. Lait, with money given to her by her mother for that purpose.

Dr. Stonestreet, on behalf of the Proctor, — who had felt it to be his duty to lay the facts before the Court, believing that the party had been improperly admitted a pauper, — upon the four grounds set up in the Act on Petition, supported by affidavits, submitted that Lait possessed property which disentitled him to the privilege he claimed; citing *Lovekin v. Edwards*.*

JUDGMENT.

SIR H. JENNER PUST.

I am quite satisfied that the party is not entitled to the privilege of suing as a pauper from the joint affidavit

* 1 Phill. 179.

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of Pope, Smith, and Legge; the first of whom makes oath that, in 1841, he attended a sale by auction, held by the assignee of Lait (then adjudged a bankrupt), of some property belonging to him, by the directions of the wife of Lait, as his agent, and there bid for and purchased a freehold cottage, and paid a portion of the purchase-money, which was afterwards repaid him by Lait, who completed the purchase by paying the remainder of the money, as he was informed by Lait; and Legge makes oath that Lait subsequently resided at that cottage, and that he sold some of the household furniture there by auction for £18, the greater part being bought in by Lait, and was then in his possession at the cottage, and worth £30; and that Lait afterwards employed the deponent to let the cottage at the yearly rent of £18, but that he had not yet obtained a tenant; and Smith makes oath that certain houses, which Lait's wife claims as belonging to her, are let at rents producing £70 per annum, and which are paid to the agent of Mrs. Lait. Against this affidavit we have the affidavit of Lait and his wife, and I have no doubt that there has been some arrangement between the parties, by which Mrs. Lait is the ostensible proprietor of the house, and her husband lives with her, and by her and her daughter is maintained. These affidavits show that Mr. Lait has not established the fact which he is bound to establish, namely, that he is entitled to carry on this suit not out of his own means, and by the labour of others. He is not merely to show that he is not possessed of five pounds, after the payment of his just debts (though that is the form of the oath), but that he is in such a situation that he is entitled to carry on the suit at the expense of others, by which the adverse party may be prejudiced if Mr. Lait fails in establishing his case. I am clearly of opinion that he is not entitled to be admitted a pauper, and I rescind the Decree of the Court admitting Mr. Lait a pauper, and assigning him Proctor and Counsel; and, if he thinks proper to prosecute the suit, he must do so at his own expense.

The party dis-
paupered.

A. Fenton, Proctor.

Consistory Court of London.

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Bye-Day.

DEVEREUX v. DEVEREUX.—*Allegation.*—This was a suit by the wife against the husband for a divorce by reason of his cruelty. The Libel was admitted *in pœnam*, the husband not appearing, and being in contempt. An Allegation of Faculties was now offered.

Practice.—In a suit for divorce by the wife against the husband, the latter being in contempt, and the proceedings against him being *in pœnam*, an Allegation of Faculties cannot be taken *pro confesso*, but must be proved by witnesses.

Dr. R. Phillimore, for the wife, moved its admission.—This being a proceeding *in pœnam*, the question is, whether we should examine witnesses, the party being in contempt.

DR. LUSHINGTON.

Your Allegation is entitled to be admitted, but I cannot take it as true. [*Phillimore.*—Are we to examine witnesses under these circumstances?] If you do not, I cannot assume the truth. If a Libel is admitted *in pœnam*, you must prove it afterwards. It is impossible I can assume the truth.

(Allegation admitted.)

JUDGEMENT.

BROWN, BY HER GUARDIAN, v. BROWN.—*Allegation.*—This was a suit commenced by the wife against the husband, charging him with the commission of adultery. A Libel had been admitted, and a defensive Allegation by the husband. An Allegation was now offered on the part of the wife, responsive to the husband's Allegation, and exceptive to the credit of some of his witnesses. It pleaded as follows:—

Practice.—Rules as to the admission of averments, in a plea exceptive to the credit of witnesses, of matters known before publication.

1. That the husband has, by himself and also by W. D., his attorney, and also by H. B. R. and R. G., or one of them, acting as his (the husband's) agents, by means of payment and promises of money, and threats and intimidations, induced and prevailed upon G. W. T., examined as a witness on his Allegation (dated 8th June, 1849), falsely to assert the truth of, and to

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become a witness to prove, the contents of the said Allegation, or such parts thereof to which he has been designed as a witness.

2. That the said W. D. and H. B. R., or one of them, acting therein as the agents and with the knowledge of the husband, amongst other things, for the purpose of preventing J. T., A. G., and E. P., witnesses examined on behalf of the wife, from giving evidence on her behalf in this cause, have by themselves or by means of T. G., a witness examined in this cause on behalf of the husband, and of the said R. G., threatened to institute criminal proceedings against them for conspiracy and perjury, in respect of the proceedings in this cause, if they or either of them gave evidence herein for the wife; and that, previous to the examination of the said G. W. T., in support of the husband's Allegation, the said W. D. delivered, or caused to be delivered, to the said G. W. T., an undertaking or promise in writing to the following effect: "I do hereby promise, in consideration of G. T. becoming a witness for the defendant in an action, 'Brown v. Brown,' to withhold proceedings against J. W., A. G., and E. P., for conspiracy or perjury;" that such undertaking or promise was subscribed by W. D., and, if not lost or destroyed, is now in the custody or possession of the said G. W. T., and that a draft or copy thereof is in the custody or possession of the said W. D., or H. B. R., and that the "G. T." mentioned therein, was and is the said G. W. T., a witness examined in this cause, and that by the words "becoming a witness for the defendant in an action, 'Brown v. Brown,'" was and is meant the said G. W. T. becoming a witness for the husband in this cause; that by J. W., A. G., and E. P., are meant persons of those names witnesses examined in this cause.

3. That the said G. W. T., several times after the commencement of this suit, endeavoured to extort money from W. S. and L. H., mentioned in the adverse Allegation, by amongst other things threatening to make his wife (thereby meaning J. T., in the said promise or undertaking called J. W.) say or declare that what she had stated in her examination as a witness in this cause was untrue; that on or about the 9th April, 1849, the said G. W. T., who had previously made similar demands on and threats to the said L. H., went to the said W. S., at &c., and demanded money of W. S., and on his refusing to comply with such demand, he (G. W. T.) threatened to go to the said W. D., and to obtain money from him; that on the same day, the said G. W. T. went to the husband, and received money from him for or on account of this cause and of his evidence herein, and that, since such time, the said G. W. T. has received considerable sums

of money from the husband and W. D., solely by reason or on account of this cause and of his evidence herein ; that shortly previous to his examination as a witness in this cause, G. W. T. received from the said W. D., *or from some other person unknown to the party proponent, acting as the agent of the said W. D.,** the sum of £50, expressly on account of his then undertaking to be examined as a witness in this cause, and to give evidence for the husband. 4. That, on or about the 14th January, 1850, at a public house, called, &c., the said G. W. T. admitted and declared, in the presence of several persons of good faith and credit, that since the refusal of the said W. S. to comply with his demand for money, pleaded in the preceding article, he had often received sums of money from or on account of the husband and W. D. for his evidence, or on account of this cause, and that he had on one occasion received the sum of £50 through the hands of the said W. D. on account of this cause, and that the said G. W. T. has on many other occasions made declarations and admissions to that or the like effect. 5. Pleads the general character of G. W. T., that he is unworthy of credit, and a person of bad character. 6—8. Plead, in contradiction to the adverse Allegation, the general good character of certain witnesses examined on the Libel. 9. Pleads in answer to, and explanatory of, the adverse Allegation, that, soon after the commencement of the proceedings in this cause, and more particularly after the admission of the Libel, the said W. D., the attorney of the husband, and acting on his behalf, and with his knowledge, combined and confederated together with the said H. B. R., R. G., and T. G., by undue means and threats and intimidations, and offers of money, to prevent the said A. G. and E. P., and the said J. T., from attending to give their evidence in this cause, and that in order to defeat such combination and confederation, the said A. G., E. P., and J. T. were removed and taken to the place mentioned in such Allegation, to secure their production as witnesses in this cause, during the whole of which time they were followed and watched by persons whose names are unknown, *acting as the agents or in behalf of the husband and W. D., and** who by offers of money and threats of criminal prosecution against the said A. G., E. P., and J. T., constantly endeavoured to prevent them from attending to give their evidence in this cause. 10. That, previous to the production of H. H. and M. H., her daughter, as witnesses in this cause on behalf of the husband, they severally offered to give evidence on

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* The words in *italics* were expunged by direction of the Court.

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behalf of the wife and against the husband, and repeatedly demanded money of L. H. (referred to in the adverse Allegation), in consideration of their giving such evidence; that L. H. refused to comply with their demands, and that it was not until they had failed to extort money from L. H. that they were produced as witnesses in this cause on behalf of the husband.

ARGUMENT.

Sir J. Dodson and *Dr. Harding*, in support of the Allegation.

Dr. Haggard and *Dr. Jenner*, *contrà*, objected the want of specification, and generality of the averments, the charge being subornation of perjury against the husband; they also urged that a party cannot plead after Publication, in an Exceptive Allegation, facts known before publication.

JUDGMENT.

DR. LUSHINGTON.

The object of the Court must be to receive all the evidence properly bearing upon the question, and to exclude other matters. At the same time, it is not easy to lay down general rules as to what ought to be admitted or excluded at any period of the cause.

It is necessary to consider the pleadings. The Libel was brought in on the 8th December, 1848, and pleaded a number of facts which the Court was of opinion were wholly irrelevant to the issue it had to try and which the witnesses were to prove; the *gist* of it is, to charge Mr. Brown with committing adultery during the time he was in confinement in the Queen's Prison. Subsequently, Additional Articles, and further Additional Articles, and still further Additional Articles, all pleading adultery, were admitted, and witnesses have been examined upon these pleas. In the next place, an Allegation was brought in by Mr. Brown, of the nature of a Defensive and Responsive Allegation. The first article counterpleaded the charges of adultery contained in the Libel and Additional Articles; the second pleaded the different rooms in the prison occupied by Mr. Brown; the third, fourth, and fifth articles were rejected. The sixth, seventh, and eighth articles excepted to the credit of J. T. (wife of G. T.), A. G., and E. P., witnesses examined on the Libel and Additional Articles. The ninth article pleaded

that W. S., Attorney, and M. G. S., his son, by themselves or agents, J. T. G., — H., — P., and — S., had, by means of payment and promises of money, induced the said J. T., E. P., and A. G., falsely to assert the truth of, and to become witnesses to prove, the contents of the Libel and Additional Articles ; that in December, 1848, or January, 1849, the said J. T., E. P., and A. G., were conveyed by the said — H., the agent of W. S., and with his privity, to, &c., and afterwards removed to some other place unknown, where they were maintained at the expense of W. S., and that they were superintended by the said — H., and taught and instructed to depose falsely against the husband in this cause.

Before I direct my attention to the Allegation now offered, I will consider the objection, that facts which were known before publication, and might have been pleaded before publication, or which might have been the subject of interrogatories addressed to the witnesses, cannot be pleaded in an Exceptive Allegation.

It is impossible to lay down a general rule upon this point. It is true that, in one sense of the word, parties are not at liberty to plead facts after publication which they could have pleaded before publication ; but they must be facts bearing upon the principal issue in the cause. But the question, whether the credit of a witness is an issue collateral to the main issue, stands in a different position. I had occasion to consider this question in the case of *Trevanion v. Trevanion*,* when I rejected reluctantly an Exceptive Allegation, following the great stream of authority, and my judgment was affirmed by the Superior Court.† The credit of witnesses cannot be considered as collateral to the issue, or the very best means of ascertaining the truth would be shut out. It is not what witnesses swear, but what they swear truly, to which the Court must look. I am disposed, in perfect accordance with what fell from me on a former occasion, to admit evidence of this kind.

The first article is, therefore, admissible; and with regard to the second, the document is beyond all doubt admissible,

* 1 Curt. 406.

† 1 Curt. 486.

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With respect to the fourth article, pleading admissions and declarations, you are at liberty to ask a witness whether he made a certain declaration, and if he denies it, you may plead and prove that he did; but you are not at liberty to do so if it is collateral to the issue.

Allegation admitted.

I have no doubt that the ninth article is strictly responsive. (Allegation admitted, with a few reformatations.)

Proctors:—*Wadson*, for the wife; *Poynter*, for the husband.

Practice.—A wife, sued for adultery by her husband, may refuse, in her Personal Answer to his Libel, to answer articles pleading, not criminal matters, but circumstances leading up to the alleged adultery.

ARGUMENT.

KING v. KING.—*Answers.*—This was a suit for a divorce, by reason of adultery, by the husband against the wife. Her Personal Answer to various articles, forming the bulk of the husband's Libel, pleading no criminal matters, but circumstances as leading up to the alleged adultery, was to this effect: "She is advised and submits that, by the rules of law and the practice of this Court, she is not bound to answer any or either of the matters and things therein respectively pleaded and set forth." This Answer was objected to as insufficient.

Dr. Haggard, for the husband.—The wife is to give full, sufficient, and distinct answers, though not obliged to criminate herself. The rule of law upon the subject of Answers is contained in the case of *Dysart v. Dysart*.*

Dr. Harding, on the same side, cited *Schultes v. Hodgson*;† *Chambers v. Thompson*;‡ and *Finch v. Finch*.§

Dr. Jenner, for the wife.—The case of *Dysart v. Dysart* was a suit for cruelty, to which different principles apply. In *Schultes v. Hodgson*, the question arose under a Statute, whether, in an Ecclesiastical proceeding, you can tender an oath to a party to charge himself with a crime.

Dr. Bayford, on the same side.

THE COURT held the Answers to be sufficient.

Proctors:—*Tabbs*, for the husband; *Nicholl*, for the wife.

* 3 Curt. 543.

† 1 Add. 111.

‡ 4 Bro. C. C. 431.

§ 2 Vea. 403.

High Court of Admiralty.

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Add. Court Day.

THE "WOODPARK" (WHITEHEAD).—Cause, by Act on Collision, be-
Petition.—This was an action by the owners of the fishing- tween two ves-
smack *Atalanta*, of fifty-six tons, against the brig *Wood-* sels, on dif-
park, of 195 tons, to recover for the damage done to the ferent tacks.
smack in a collision between the two vessels ; a cross-action
having been entered by the owners of the *Woodpark* against
the *Atalanta*.

The owners of the latter vessel alleged that she was re-
turning home from her fishing-ground in the North Sea,
and about half-past nine P.M., on the 15th November, was
proceeding up the Swin, close-hauled on the starboard
tack, the wind blowing strong from N.W. and by W., the
night rather dark, but clear enough to permit vessels being
seen from each other at more than a quarter of a mile dis-
tance, the master being at the helm, and others on deck,
when the *Woodpark* was observed upon their lee bow, dis-
tant about a quarter of a mile, reaching up on the larboard
tack ; that the course of the smack was not altered, but she
was kept as close to the wind as she would lie, until, at the
moment when a collision appeared inevitable, the master,
finding that the brig could not go ahead of his smack, as
she was endeavouring to do, put his helm to port, which
threw the smack up into the wind, and at the same moment
the brig came in contact with her, doing her much damage ;
that the collision was caused solely through the careless-
ness or mismanagement and want of nautical skill of those
on board the brig, and that, if they had ported their helm,
as they were bound to have done, the brig would have gone
under the stern of the smack, and no collision would have
occurred.

The Answer of the owners of the brig alleged that she
was on a voyage from Shields to London, with coals, and
about eight P.M. of the day of the collision, she had got
under weigh (having anchored near the Shears Light House,

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on the Maplin Sand, to wait for the tide), and stood towards the Mouse Light; that about a quarter past nine, being then about midway between the Mouse Light and the Black Tail Beacon, she tacked and stood to the N.E., on the lar-board tack, the wind blowing a fresh breeze from about the N.N.W., the night fine and clear, though dark, all hands being on deck, the master near the helm; that whilst so standing to the N.E., the *Atalanta* was observed standing to the W., on the starboard tack, distant about 200 fathoms, and open about four points on the brig's lee bow; that the master immediately ordered the man at the helm to mind his weather helm, and pass a-stern of the smack, by keeping the brig's sails full, and that immediately thereupon the brig's helm was put to port, and her head began to fall off; that the smack, instead of keeping her course, as she ought to have done, shortly after put her helm also up, and by so doing stood directly towards the brig; that, it being evident a collision must ensue if both vessels kept their helms up (being then so near), they hailed the smack to keep her helm up, the brig's helm being put a-starboard, as the only means of avoiding a collision; but the smack, instead of keeping her helm up, again altered her course, by putting it down, and thereby brought herself right athwart the brig's bows; and that the collision was imputable solely to the smack.

The Court was assisted by two Elder Brethren of the Trinity House.*

Dr. Jenner and *Dr. R. Phillimore*, for the smack; *Dr. Addams* and *Dr. Bayford*, for the brig.

SUMMING UP.

DR. LUSHINGTON (*addressing the Elder Brethren*):—

Gentlemen: The course I propose to pursue is the following. I will first take the statement of the *Atalanta*, and then see whether, supposing it to be true, you can attribute to her either the whole blame, or any share of the blame, which gave rise to the collision.

Case of the
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It appears that the *Atalanta* was a fishing-vessel, of fifty-

* Captain Weller and Captain Foord.

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six tons burthen ; that she was returning from her fishing-ground, and on the 15th November, about half-past nine P.M., she was proceeding up the Swin, close-hauled on the starboard tack, with the wind N.W. by W. There is a difference as to the quarter from which the wind blew ; it is stated on the other side that it was N.N.W., being three points more to the N. You will take that circumstance into your consideration, and see whether it so operates as to make any difference in the case. It is then further alleged, on the part of the *Atalanta*, that she saw the brig, which is a collier of 195 tons, on her lee bow, distant about a quarter of a mile, the brig being on the larboard tack. Here, again, there is some considerable difference between the statements ; because, on the behalf of the collier, it is stated that she saw the smack four points on the brig's lee bow, which is certainly a very considerable difference between the statements of the parties as to what were the relative bearings of these two vessels at the time they were first descried by each other. However, assuming the statement of the *Atalanta*, for the present, to be true, the master, as soon as he perceived the brig, so being on the larboard tack, according to his own statement, did not alter the course of the smack at all, nor did he alter it till the collision became inevitable. As soon as he perceived that the collision was inevitable unless something was done, he states that he put the helm to port ; that the vessels presently afterwards came in contact, and the smack was struck by the brig on the larboard side. This is his statement ; and the charge against the brig is, that she ought to have ported her helm in time, so as to have avoided the collision, she being on the larboard tack and the *Atalanta* on the starboard tack.

But in the course of the Argument it was observed, that, whatever the result of the facts may be, it was the duty of the *Atalanta*, though on the starboard tack, instead of keeping her course, as she did, to have ported her helm as soon as she saw the brig, and so, by her own act, have avoided the collision. You will have to determine whether any share of blame attaches to the *Atalanta* for not porting her helm as soon as she perceived the other vessel, but keeping her course and

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Case of the
Woodpark.

On the part of the *Woodpark*, which was a coal-laden vessel, bound to London, it is stated that she was standing to the N.E. on the larboard tack, the wind blowing from the N.N.W., when she saw the smack four points on the brig's lee bow, and her helm was put to port. Supposing this to be correct, as a matter of fact, I apprehend that would have been a proper measure for her to have pursued, as soon as she descried the smack. Therefore, so far (if it be true), no blame attaches to her. But then she makes a charge against the smack, which, she states, put her helm to starboard. If the smack, under these circumstances, did put her helm to starboard, and you credit it, according to my apprehension, subject to your judgment, the smack was undoubtedly to blame in so doing, and nothing was more probable than that there would be a collision. If one put the helm to port and the other to starboard, it would increase the probability. But this is not the whole of her statement. She says the brig's people hailed the smack to keep her helm up, and changed their own course from porting to starboarding the helm. Two questions then arise; first, whether you believe this was done; and, secondly, whether you think the brig was right or wrong, supposing it was done. Then they say, that the smack put her helm to port, and so the collision took place.

Questions.

These are all the facts. It is useless to refer to the affidavits, because the affidavits and the statements in the Act on Petition precisely accord; and you must determine which of the parties is to blame. I do not think it necessary to enter into the question as to what was done after the collision, which is a question not necessary for us to determine. The points appear to be these: whether you are of opinion that the collision arose from the brig not porting her helm in time; or whether you are of opinion that the smack really did starboard her helm, and so produced the collision; or whether you think the smack was too tardy in porting her helm.

CAPTAIN WELLER.

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The *Woodpark*, being on the larboard tack, ought to have bore up on first seeing the *Atalanta*, so as to show her intention to pass to leeward, agreeably to the established Rules. We think her to blame, and attach no blame to the *Atalanta*.

Woodpark.

OPINION.

PER CURIAM.

JUDGMENT.

I pronounce for the damage.

Proctors:—*Jenner*, for the smack; *Crosse*, for the brig.

THE “EDWARD” (HAASE).—*Cause, by Act on Petition.* Collision between two vessels on contrary tacks. —This was an action by the owners of the late brig *Melissa*, 177 tons, against the brig *Edward*, 179 tons, of Wismar (Mecklenburg Schwerin), to recover for the total loss of the former vessel, which was sunk in a collision between the two vessels.

The Act alleged that the *Melissa* was on a voyage from North Shields to Barking, with coals, and about ten P.M. of the 8th November, she was off the coast of Yorkshire, Flamborough Head Light bearing S. $\frac{1}{2}$ E., and Scarborough Light bearing N.W. to N.W. by N., the wind blowing strong from W.S.W. to S.W. by W., the brig steering S.S.E., when the look-out forward reported a ship ahead, and the master saw a vessel, distant from a quarter to half a mile, standing towards her; that the strange vessel shortly after bore up, standing to the N. on the larboard tack; that, upon her bearing up, the *Melissa's* helm was ported and she kept her luff, and her head came up close to the wind; that in about a minute afterwards, the strange brig (which was then to leeward) again altered her course, luffed up to the wind, and stood directly towards the *Melissa*, the master of which, seeing that the strange brig was still from 100 to 200 yards distant, kept his luff, expecting the other vessel would bear up again, and hailed her, but she came stem on, and struck the *Melissa* (her helm being still hard to port) violently on the larboard bow, doing her considerable damage,

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and in about three hours she sank, the crew saving themselves in their boat; and that the collision was occasioned solely by the carelessness, or want of skill and of good management, or of a good look-out, on the part of the *Edward*.

The Answer, by the foreign owners of that vessel, alleged that she sailed that day in ballast from Hull for Newcastle, with an assistant pilot on board; that at about half-past nine P.M., the wind blowing strong from the W. and by S., the brig was on the larboard tack, close-hauled by the wind, lying from N.W. by N. to N.N.W., when about two miles from the shore (Scarborough Castle bearing N.W. by N.), the *Melissa* was seen ahead, a little on the starboard bow of the *Edward*, upon which a lantern was shown from the brig's starboard bow, all on board hailing the other vessel to bear away, but, though running free, she kept approaching the *Edward* without any alteration of her course; that a collision appearing inevitable, the pilot on board the *Edward* (as the only means, if not of avoiding the collision, of lessening its effect) ported her helm and lowered her peak, at the same time hailing the *Melissa* to luff and keep her helm down; that the *Edward*, after she had ported, did not (as alleged) again alter her course, and luff up to the wind, and stand towards the *Melissa*, for, on the contrary, almost immediately on the *Edward's* helm being ported, and before she could have again altered her course, the collision took place, by the *Melissa* striking the *Edward* with great force on the starboard bow; and that the collision was imputable solely to the *Melissa*, which was running free, not bearing away at all, or not in time.

The Court was assisted by the same Trinity Masters as in the preceding case.

Dr. Haggard and *Dr. Bayford*, for the *Melissa*; *Dr. Addams* and *Dr. Twiss*, for the foreign vessel.

SUMMING UP.

DR. LUSHINGTON (*addressing the Elder Brethren*):—

Gentlemen: It is admitted that the collision which is the subject of the present suit was not occasioned by

accident, for each of the litigant parties attributes it to the mismanagement of the other. You have heard some discussion as to what are the Rules laid down by the Trinity Board, and as to their application to the circumstances of the present case. Of course, before you look at the Rule and see how it applies, it is necessary to look at the facts of the case, in order to make up your minds as to which is the true statement. It was argued by the Counsel on behalf of the *Edward* that she was close-hauled, and that the *Melissa*, sailing free, though on the starboard tack, ought to have given way, as the *Edward* was so close-hauled. In order to ascertain the fact, whether the *Edward* was close-hauled or not, several things are necessary to be known. You must take into consideration, first, the locality where the collision took place; then the destination of the two vessels, and the course they were pursuing, and afterwards you will decide the quarter from whence the wind blew, according to the best of your judgment, from the evidence on both sides. Here two of the points at least are clear; the *Melissa* was coal-laden, bound from Shields to Barking; the *Edward* was proceeding in ballast from Hull to Newcastle. The place where the collision occurred is stated in very nearly the same terms by both parties; I need, therefore, only refer to one of these statements, and I take that on behalf of the *Edward*. The Answer says, she was about two miles from the shore, Scarborough Castle bearing N.W. by N., when her master and crew, who were all on deck, saw a vessel ahead, a little on the starboard bow; so that two of these points are clear, namely, the destination of the vessel and the locality. Now we come to the wind. It is stated on behalf of the *Melissa* to have blown from W.S.W. to S.W. by W., and her course is stated to have been S.S.E. The *Edward* alleges that the wind was W. and by S. So far as I can make out, there is about a point or a point and a half difference between them, as to the wind. The proper course of the respective vessels must be left entirely to your judgment; it is a point of nautical knowledge. You will have to determine whether you are of opinion that the *Melissa*, though on the starboard tack, was sailing free;

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whether the *Edward* was sailing close-hauled; and whether it was or was not the duty of the *Melissa* to give way. If it was her duty to give way, you must consider what was actually done; if it was not her duty to give way, of course very different consequences would ensue.

We will proceed, then, with the facts of the case. According to the statement of the *Melissa*, she first descried the *Edward* on her starboard bow. There is some difference here from the statement on the part of the *Edward* as to the bearing of the *Melissa*; but I hold these matters to be of very little importance, for it is extremely difficult to extract from the evidence, in any of these cases, the precise bearing of one vessel to the other, when they are descried at night, the bearings so often shifting. If the vessels are approaching each other, and there is a reasonable chance of a collision, all your Rules apply, and it is not necessary to determine whether their bearing was a point one way or the other, knowing from experience that it is utterly impossible so to do. With regard to the distance at which these vessels were seen from each other, there is a great discrepancy, as there is in every other case. I apprehend there really must be very great difficulty in measuring the distance at night, and I hardly recollect a collision case in which the parties did not differ on this point, and there is not only a difference between the two ships, but among the men on board the same ship. There is an obvious reason for this: the crew are too much engaged to measure the distance between the two vessels with any degree of accuracy. We may dismiss this matter, therefore, from our consideration.

The statement on behalf of the *Melissa* is this; she alleges that the *Edward* bore up—as to whether that fact was so or not, you must make up your minds; that she was standing to the N. on the larboard tack; and she says that, under these circumstances, she ported her helm, and the collision occurred in consequence of the *Edward* having starboarded her helm, and so striking the *Melissa* on the larboard bow. That is her complaint against the *Edward*.

On the part of the *Edward*, the case is very differently stated; for having first represented that a lantern was hung

out on the starboard bow, they state that they hailed the *Melissa* to bear away, because she was going free; and, therefore, they expected her to starboard her helm. But they say she kept her course, until a collision became inevitable, when the helm of the *Edward* was ported, and the collision took place because the *Melissa* did not port in time.

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We must now look at the affidavits made in this cause on Evidence. the part of the *Edward*, because it strikes me that they are of very considerable importance. I hold in my hand the first affidavit of Haase, the master, and Heidtman, the mate. They say they could distinguish objects at the distance of a mile and a half; that they saw a strange vessel ahead, and a little on the larboard bow, and they showed a lantern; that the strange vessel was running free; that the brig was then about two English miles from the shore; that they hailed the strange vessel to bear away, but no notice was taken whatever. Here the whole story closes, and the affidavit simply states that the strange vessel came in collision with the brig, striking her on the starboard bow. As to anything done on board the *Edward*, there is not an atom of evidence. The next affidavit is to the same effect. We must, however, refer to the affidavit of Crow, the assistant pilot, who was skilled in navigating between Hull and the northern ports. He says the wind still blew from the W. and by S., the brig being on the larboard tack, close-hauled by the wind. Several vessels on the starboard tack passed on the larboard side of the brig. This I do not quite understand. He says that, at half-past nine P.M., he could distinguish objects on the sea at a distance of a mile and a half; that when the strange vessel approached within hailing distance, she was hailed to bear away. I should like to have had it explained in the Argument how it was, considering that all the other vessels which had been passing to the S. had passed on the larboard side, that this vessel was hailed to bear away; but I have had no explanation on that point from Counsel. We now come to a passage in this affidavit entirely omitted in the evidence both of the master and the mate;—"The strange vessel still continuing to

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approach, this deponent immediately ported the helm of the brig, and lowered her peak." It must have been known to the master, the mate, and the crew, whether these measures were adopted or not; but they say nothing respecting it. I now come to the conclusion of this affidavit:—"That, in the judgment of this deponent, the collision arose entirely through the neglect of the captain and crew of the strange vessel in not keeping a proper look-out." But that is not all. "If the helm of the strange vessel had been luffed in proper time, she would have sailed clear of the brig, whose helm this deponent had put hard a-port." I should have been very glad to have had some explanation of this fact; but I have had none.

Questions.

You will form your opinion as to which of the stories is true. If you think the *Melissa* was bound in the first instance to have starboarded her helm, unquestionably she did not, and she would, therefore, be to blame. If you think that she was not bound to starboard her helm, it appears that she did all that she ought to have done. With respect to what the *Edward* did, I confess it is not very certain what measures she did take.

OPINION.

CAPTAIN WELLER.

We consider that the wind was W.S.W. very nearly, within a quarter or half a point, in which case both the vessels had the wind free; the course of the one was S.S.E., that of the other N.N.W. The collision was caused by the *Edward* not porting her helm and passing to leeward.

JUDGMENT.

PER CURIAM.

I pronounce for the damage.

Proctors:—*Deacon*, for the party proceeding; *Ring*, for the foreign vessel.

Archies Court of Canterbury.

MARCH 2.

Add. Court Day.

NICHOLL v. THOMAS.—*Appeal.—Act on Petition.*—This was an appeal from a Decree of the Consistorial Court of Saint David's, in a suit respecting the validity of a will of Mr. T. B. Davies, of Maesycrigie, in the county of Carmarthen, who died 24th May, 1848. The will, which was dated on the 17th, was propounded by Mr. Thomas Thomas, the sole executor named therein, and opposed by Mrs. Nicholl, the sister of the deceased and only next of kin. On the 24th April last, the Judge of the Court at Carmarthen pronounced in favour of the will, and from this sentence the present appeal was interposed to this Court, where, in the course of the preliminary proceedings, the existence of two Bills was discovered, whence it was alleged that the deceased had died possessed of *bona notabilia*, whereby the proceedings in the Court below would become a nullity. The question of jurisdiction was raised in an Act on Petition between the respective Proctors, which alleged, in support of *bona notabilia*, that, besides personal effects within the diocese of Saint David's, in which the deceased died, there were two persons debtors to him by simple contract, resident at the time of his death in other dioceses, namely, James Whitaker, formerly of Langharne, in the county of Carmarthen, and Henry Lucas, of Swansea, in the county of Glamorgan; that on the 18th February, 1847, Whitaker (then resident at Langharne) and Lucas (then resident at Swansea), being indebted to the deceased, as the purchasers of some of his farming stock, gave him, the former his Promissory Note, of that date, for £15.9s., payable in four months, and the latter his Bill of Exchange, of that date, for £49.15s.6d., payable in eight months, in liquidation of their respective debts, neither of which had been paid, so that the said sums still remained due from them to the deceased at the time of his death; that Whitaker, in October, 1847, quitted Langharne, in

Where a testator, dying possessed of personal property in a single diocese, had, in his lifetime, taken Bills, for goods sold and delivered, from purchasers then resident within the diocese (but who at the time of his death had removed to other dioceses), which securities he had endorsed over to his Bankers, who discounted the Bills, which were dishonoured, and not paid at his death, and still remained unpaid:—Held, that *bona notabilia* were thereby established, founding the jurisdiction of this Court.

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consequence of pecuniary difficulties, and was, at the time of the deceased's death, resident within the diocese of London, and subsequently, in November, 1848, he embarked for Australia; that Lucas, in November, 1847, quitted Swansea, and was, at the time of the deceased's death, resident within the diocese of Bristol; that the Promissory Note is now in the possession of Messrs. Wilkins and Co., of Carmarthen, Bankers, who had discounted the same for the deceased in his lifetime, and that the Bill of Exchange is now in the possession of Messrs. Morris, of Carmarthen, Bankers, who had in like manner discounted the same for the deceased in his lifetime. The Answer, on behalf of the executor, alleged that the Note and Bill referred to were regularly endorsed and transferred over by the deceased to the respective Bankers, who discounted the same; and that the deceased, at the time of his death, had not any beneficial interest whatever in either of the securities, which became the property of the Bankers. The Reply alleged that, inasmuch as the said securities were dishonoured when payment was due, the amount of each became demandable from the deceased, and are now recoverable by the holders from his estate; and that as both the Note and the Bill were given to the deceased for goods sold and delivered, upon their dishonour, the deceased's right to sue the several purchasers upon the original consideration (which had been suspended in the meantime) revived, whereby the purchasers, Whitaker and Lucas, became debtors to the deceased's estate.

Dr. Addams and Dr. Harding, in support of the Petition;
Dr. Jenner and Dr. Twiss, contra.

JUDGMENT.

SIR H. JENNER FUST.

The only difficulty I have, is as to the possibility of the parties who gave these Notes being sued in two actions,—one by the Bankers, the holders of the Notes; the other by the representative of the deceased, who was the vendor of the goods. That the debts were not extinguished, there can be no doubt; the question is, whether they were due from Mr. Lucas and Mr. Whitaker to the

estate of the deceased. The facts are admitted,—the purchase, the amount, and the delivery of the goods, and it is admitted that the debts have not been paid by them, either to the Bankers or the vendor; the amount remains a debt to one or the other. The cases are not very specific, and what is the actual state of the law it is difficult for me to say; but I am inclined to hold that these Notes are *bona notabilia*; and if the parties are liable to be sued by the Bankers and by the representative of the deceased, there must be some means of protecting them, and staying the double action. The Bills were protested, having been dishonoured, and notice was given to the deceased of their being dishonoured, and payment was demanded of him. The Bills, however, remained unpaid in the hands of the Bankers, who have a right of action against the parties who gave them; but they may also have a right of action against the party for whom they discounted the Bills. I am, therefore, of opinion that there were *bona notabilia*, at the time of the deceased's death, provided the parties, the purchasers of the deceased's stock, who gave those Bills, were resident out of the jurisdiction of the Court of Saint David's; and it is clear that they were resident the one at Bristol and the other in London. There can be no doubt that Bills of Exchange are *bona notabilia* where the debtor resides; the only question is, what is the effect of the endorsement to the Bankers, and of the Bills being dishonoured? I am inclined to hold that the debts do constitute *bona notabilia*; they are not extinguished; they are still due from Messrs. Lucas and Whitaker to the estate of the deceased, and as they are resident out of the jurisdiction of the Court of Saint David's, all the proceedings there are null and void *ab initio*. The cause must, therefore, begin again here, as an original cause, not as an appeal. The difficulty is to know what should be the form of the sentence, whether I should pronounce for the appeal or against it. The best way will be to dismiss the cause at once, on the ground that the proceedings in the Court of Saint David's are nullities.

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Cause dismissed.

Proctors:—*Tebbs*, for the Appellant; *Jennings*, for the Respondent.

High Court of Admiralty.

Add. Court Day.

MARCH 7.

Bottomry.—**THE "GRECIA" (PAIGE).**—*Motion.*—The vessel, in this case, had been sold under a Decree of this Court, in a cause of Bottomry, and the proceeds of the sale, £803, had been brought into the Registry to answer two bonds, amounting to £609. It appeared that, at the end of the Charter-Party, were, signed by the then master, the following

ADDITIONAL ARTICLES.

The Charterer undertakes to pay to the captain, on account of the freight, £400 sterling, for which the captain shall pay the charges of three per cent. for once, and moreover the insurance that shall result upon the account which shall be produced to him in London.

The captain also undertakes to pay the difference of insurance that may arise between the Moldavian flag and the Austrian flag, as customary to be paid upon vessels underwritten at Lloyd's in London.

Galatz, $\frac{30}{9}$ October 1848.

(Signed) T. N. Mitros.

I, the undersigned, Captain T. N. Mitros, in command of the Moldavian brigantine called *Grecia*, declare to have received of and from my shipper Sigr. S. Goldner, once, the sum of £400, for which I have already given the regular receipt, and there remains for this to pay the insurance, whatever shall be the amount, according to the account thereof in London.

Furthermore, I declare to have received of and from the aforesaid, on account also of my freight, the sum of £882, for which I have already paid the insurance, as appears by the second receipt given by me, so that the total amount received, added to the £400, makes £1,282, which, on my safe arrival in London, shall be deducted from my freight, and in case my freight should not be sufficient to pay the above sum, for whatever reason the same may be, the said debit shall be retained as a bottomry bond.

Galatz, the 24th Novr. 1848.

(Signed) T. N. Mitros.

From the accounts annexed to the affidavit of the agent of Mr. S. Goldner, it appeared that, after deducting the amount

Additional Articles, appended to a Charter-Party, signed by the master, acknowledging the receipt of money on account of his freight (for which he had paid insurance) which, with other moneys, he stipulated should, "on his safe arrival in London," be deducted from his freight, and in case his freight should not be sufficient to pay the same, "the debit shall be retained as a bottomry bond:" on Motion to decree payment of these advances, as on bottomry, out of proceeds of sale of the vessel in the Registry:—Held (without deciding whether, if the facts were otherwise, this was a bottomry-bond), that there was no maritime risk, nor proof that the advances were for the necessities of the ship.

of freight, there was a balance due to him of £799, which, it was submitted, he was entitled to receive, under the Additional Articles, as on a bottomry-bond, so far as the remaining balance of the proceeds of sale of the ship (after deducting the £609, due under the two bottomry-bonds) would pay the same ; and

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Dr. Twiss moved the Court to decree a warrant to issue MOTION. against the proceeds in the Registry on behalf of Mr. Goldner, the holder of the bottomry-bond endorsed on the Charter-Party. There is no precedent of a bottomry-bond endorsed on a Charter-Party ; but it is submitted that the form is not restricted. There is apparently a maritime risk, namely, "on my safe arrival in London ;" and maritime risk seems to be the substantial foundation of a bottomry transaction. The Articles directly stipulate that "the debit shall be retained as a bottomry bond." The Court has held, that an agreement for a bottomry-bond is as valid as a bond itself. *The "Aline."**

DR. LUSHINGTON.

As the sum is small, it is desirable that the Court JUDGMENT. should dispose of the question at once ; although this is a mere preliminary proceeding, to arrest the money that remains in the Registry.

It appears that this claim is founded upon certain Additional Articles appended to a Charter-Party, which bore date originally on the 2nd October, 1848, and finally these Additional Articles bear date on the 24th November in the same year ; and it is upon the strength of these Articles, more particularly the latter clause, that the application is made to the Court to arrest the proceeds.

Some very considerable difficulty arises upon the first view of the question, because a bottomry-bond must not only include maritime risk, but also it must be for the necessities of the ship, and the Court must be satisfied, before it can pronounce for the validity of a bottomry-bond, and decree it to be paid out of the proceeds of the vessel, that

* 1 Rob. jun. 111.

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the money was advanced for that purpose. But I have here no statement of that kind, nor the slightest evidence to show that it was more than a simple advance upon the freight,—for what purpose I am left in total ignorance. That is not the only difficulty, because there follows this clause, “for which I have already paid the insurance.” So that the master, who receives an advance of £882, eventually to be paid out of the freight, has actually paid the insurance; so that no maritime risk was run on the freight, on the part of the person who advanced the money, the risk being of a different description, viz. in case the freight should prove insufficient to answer the demand; but maritime risk there is none.

This is quite enough to dispose of the present application, without entering into the question, which would deserve consideration if the facts were otherwise, namely, whether this is a bottomry-bond at all; for all that is said is this, “In case my freight should not be sufficient to pay the above sum, for whatever reason the same may be, the said debit shall be retained as a bottomry-bond.” It is perfectly true that, in one case,* under the peculiar circumstances, I did hold an agreement for a bond a valid bond; but it is not to be inferred from thence that I should be ready to adopt that as a general principle, unless the same or similar circumstances to those that occurred in that case would lead to a similar conclusion.

Motion
rejected.

Looking to the circumstances of this case, it would be useless to arrest the proceeds in the Registry, for I think I should not be justified in paying them out. The Motion must be rejected.

Jennings, Proctor.

* *The “Abne,”* 1 Rob. jun. 122.

Judicial Committee of the Privy Council.

MARCH 8.

GORHAM, CLERK, v. THE LORD BISHOP OF EXETER. In a proceeding by a clerk, presented to a benefice, against his diocesan, for refusing to institute him, on the ground that, upon examination, he had been found to have maintained doctrines contrary to those of the Church of England, inasmuch as he held that, before their regeneration by Baptism, a prevenient Act of Grace must render infants worthy recipients of the rite, whereas the spiritual regeneration of infants in Baptism is the doctrine of the Church:—
—Appeal.—Cause.—This was an appeal from the Arches Court of Canterbury, in a proceeding by the Rev. George Cornelius Gorham, Clerk, Vicar of St. Just, in the county of Cornwall, and diocese of Exeter, against the Lord Bishop of that diocese, for having refused to institute him to the Living of Brampford Speke, in the County of Devon, and in the same diocese, to which he had been presented by the Crown. The Court below had issued a Monition, calling upon the Lord Bishop to institute the party proceeding, or to show cause for refusing, and upon the return to the Monition, pronounced* that sufficient cause had been shown, inasmuch as the presentee had maintained that, in the baptism of infants, a prevenient Act of Grace must render them worthy recipients of the rite, which it held to be contrary to the doctrine of the Church of England, that infants were spiritually regenerated in Baptism. From this sentence an appeal was interposed to this Court on behalf of Mr. Gorham.

The Argument occupied four days (Dec. 11th, 12th, 14th, and 17th); *Turner, Q.C.*, and *Dr. Bayford*, for the Appellant; *Dr. Addams*, and *Badeley*, for the Respondent.†

LORD LANGDALE, M.R.‡

This is an appeal by the Reverend George Cornelius Gorham against the sentence of the Dean of the Arches Court of Canterbury, in a proceeding termed a *duplex querela*, in which the Right Reverend the Lord

* *Antea*, p. 187.

† It has been found impracticable (as in the Court below) to compress within reasonable limits a digest of an Argument so peculiar in its character. Mr. Badeley's Argument has been published in a separate form.

‡ This judgment was read from a printed paper.

Held, on appeal (reversing the judgment of the Court below), that the doctrine held by the presentee is not contrary or repugnant to the declared doctrine of the Church of England as by law established, and that he ought

MARCH 8. Bishop of Exeter, at the instance of Mr. Gorham, was called upon to show cause why he had refused to institute Mr. Gorham to the vicarage of Brampford Speke. The judge pronounced that the Bishop had shown sufficient cause for his refusal, and thereupon dismissed him from all further observance of justice in the premises; and, moreover, condemned Mr. Gorham in costs. From this sentence Mr. Gorham appealed to her Majesty in Council. The case was referred by her Majesty to this Committee. It has been fully heard before us; and, by the direction of her Majesty, the hearing was attended by my Lords the Archbishops of Canterbury and York, and the Bishop of London, who are members of her Majesty's Privy Council. We have the satisfaction of being authorized to state, that the Most Reverend Prelates the Archbishops of Canterbury and of York, after having perused copies of this judgment, have expressed their approbation thereof. The Bishop of London does not concur.

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JUDGMENT.

The facts.

The facts, so far as it is necessary to state them, are as follow:—

Mr. Gorham, being vicar of St. Just-in-Penwith, in the diocese of Exeter, on the 2nd of November, 1847, was presented by her Majesty to the vicarage of Brampford Speke, in the same diocese, and soon afterwards applied to the Lord Bishop of Exeter for admission and institution to the vicarage. The Bishop, on the 13th of November, caused Mr. Gorham to be informed that his Lordship felt it his duty to ascertain, by examination, whether Mr. Gorham was sound in doctrine, before he should be instituted to the vicarage of Brampford Speke.

The examination commenced on the 17th of December, and was continued at very great length for five days in the same month of December, and (after some suspension) for three more days in the following month of March. The questions proposed by the Bishop related principally to the Sacrament of Baptism, and were very numerous, much varied in form, embracing many points of difficulty, and often referring to the answers given to previous questions.

Mr. Gorham did not at first object to the nature of this

examination ; but, during its progress, he at various times remonstrated against the manner in which it was conducted, and the length to which it extended. We are, however, relieved from the necessity of considering whether he could or could not lawfully have declined to submit to such a course of examination ; because he did in fact answer nearly all the questions, and no complaint is made of his not having answered them all.

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The examination being concluded, the Bishop refused to institute Mr. Gorham, for the reason (as stated in the notification) that "he had upon the examination found Mr. Gorham unfit to fill the Vicarage, by reason of his holding doctrines contrary to the true Christian Faith, and the doctrines contained in the Articles and Formularies of the United Church of England and Ireland, and especially in the Book of Common Prayer, and Administration of the Sacraments, and other Rites and Ceremonies of the Church, according to the use of the United Church of England and Ireland." (Gorham, p. 219.)*

Mr. Gorham, being refused Institution, commenced proceedings in the Arches Court of Canterbury ; and, at his promotion, a Monition with intimation issued on the 15th June, 1848, and thereby the Bishop was monished to admit Mr. Gorham to the Vicarage, and to institute and invest him therein, or otherwise to appear to show cause why Mr. Gorham should not be admitted and instituted by the Official Principal of the Arches Court of Canterbury.

After litigation had thus commenced, and Mr. Gorham had called upon the Bishop to state why Institution was refused, it became evident that the reasons must be considered upon legal principles, and it was to be expected that both parties would require a strict and formal proceeding, in which the particular unsound doctrine imputed to Mr.

Form of proceeding.

* This reference is to a book, published by Mr. Gorham, entitled, "Examination before Admission to a Benefice by the Bishop of Exeter, followed by Refusal to institute, on the allegation of Unsound Doctrine respecting the Efficacy of Baptism," containing the several Questions and Answers, admitted to be correct, and which was brought into the Registry of the Arches Court, by the Bishop, in part supply of proof.

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Gorham would have been distinctly alleged. Unfortunately, this course was not adopted. The Bishop prayed to be heard on Petition ; and in his Act on Petition, he stated his charge against Mr. Gorham, and alleged that it appeared to him, in the course of the examination, that Mr. Gorham was of unsound doctrine respecting the great and fundamental point of Baptism, inasmuch as Mr. Gorham held, and persisted in holding, that Spiritual Regeneration is not given or conferred in that Holy Sacrament,—in particular, that infants are not made therein members of Christ and the children of God,—contrary to the plain teaching of the Church of England, in her Articles and Liturgy ; and especially contrary to the divers Offices of Baptism, the Office of Confirmation, and the Catechism, severally contained in the Book of Common Prayer, and Administration of the Sacraments, and other Rites and Ceremonies of the Church, according to the use of the United Church of England and Ireland. And, in part supply of proof of the premises, the Bishop referred to a book written and caused to be printed and published by Mr. Gorham, containing, amongst other things, the several questions put by the Bishop to Mr. Gorham, in the course of the examination, and Mr. Gorham's several answers to the same questions.

Mr. Gorham made no objection to the mode of proceeding by Act on Petition, but put in his Answer thereto ; and thereby, after alleging that the book published by him, and brought into Court by the Bishop, contained a full, true, and accurate account of all the questions and answers which were given in the course of the examination, he distinctly and emphatically denied that he in his examination did maintain, or had at any time maintained, unsound doctrine respecting the efficacy of the Sacrament of Baptism, or that he had held, or persisted in holding, any opinions thereon at variance with the plain teaching of the Church of England, in her Articles and Liturgy ; and further explicitly and expressly denied that he either held, or persisted in holding, that infants are not made in Baptism members of Christ and the children of God ; and he alleged that he did not maintain any views whatever contrary to the true doc-

trine of the Church of England, as dogmatically determined in her Articles, familiarly taught in her Catechism, and devotionally expressed in her Services,—it having been his desire and endeavour, throughout the examination, to explain the language both of her Articles and Liturgy (in compliance with the express directions of the Church herself) by such just and favourable construction as would secure an entire agreement, not only of each with the other, but of all alike, with the plain tenour of Holy Scripture, declared by the said Articles to be of paramount and absolute authority. The Bishop replied to Mr. Gorham's Answer generally. The book published by Mr. Gorham was the only evidence adduced on either side; and with such allegations as are contained in the Bishop's Act on Petition and Mr. Gorham's Answer, the case was brought on to be heard, with no statement on the part of the Bishop of what was, in his Lordship's view, the true doctrine of the Church of England in respect of the efficacy of the Baptism either of adults or infants; nor any specification of the doctrine imputed to Mr. Gorham, except the general charge before stated; and no distinct statement on the part of Mr. Gorham of what, in his view, is the true doctrine of the Church of England, what is the particular doctrine which he himself maintains on the subject in question, or in what particulars, or for what particular expressions, he requires the just and favourable construction which he considers to be necessary and sufficient to secure the entire agreement between the Articles and the Liturgy and his doctrine. As this form of pleading was acquiesced in on both sides, neither party has any reason to complain of the other; *but those who are called upon to judge* of the matters in difference have great reason to complain that, instead of their attention being directed, as it ought to have been, to specific propositions distinctly stated, and to the evidence directly applicable to those propositions; instead of having a specific and precise statement of that which the Bishop alleged to be the doctrine of the Church of England upon the matters in question, and upon which he meant to rely, and of the specific doctrine held by or imputed to Mr. Gorham, and alleged to

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be unsound;—the case is brought forward and left in such a form, that, without being supplied with any allegations distinctly stated or any issue distinctly joined, we are called upon minutely and accurately to examine a long series of questions and answers—of questions upon a subject of a very abstruse nature, intricate, perplexing, entangling, and many of them not admitting of distinct and explicit answers—of answers not given plainly and directly, but in a guarded and cautious manner, with the apparent view of escaping from some apprehended consequence of plain and direct answers.

The inconvenience of this course of proceeding is so great, and the difficulty of coming to a right conclusion is thereby so unnecessarily increased, that in our opinion the judge below would have been well justified in refusing to pronounce any opinion upon the case as appearing upon such pleadings; and in requiring the parties, even at the last moment, to bring forward the case in a regular manner by Plea and Proof.

The case comes before us in precisely the same state; and, although the Counsel on both sides have used their best endeavours to remove the vagueness and uncertainty found in the pleadings, as well as in the examination, and have thereby much assisted us, they have not been able entirely to remove the difficulty.

Evidence.

In considering the examination, which is the only evidence, we must have regard not only to the particular question to which each answer is subjoined, but to the general scope, object, and character of the whole examination; and if, under circumstances so peculiar and perplexing, some of the answers should be found difficult to be reconciled with one another (as we think is the case), justice requires that an endeavour should be made to reconcile them in such a manner as to obtain the result which appears most consistent with the general intention of Mr. Gorham in the exposition of his doctrine and opinions.

Doctrine held
 by the pre-
 sentee.

Adopting this course, the doctrine held by Mr. Gorham appears to us to be this—that Baptism is a Sacrament generally necessary to Salvation, but that the Grace of Regenera-

tion does not so necessarily accompany the Act of Baptism that Regeneration invariably takes place in Baptism; that the Grace may be granted before, in, or after Baptism; that Baptism is an effectual sign of Grace, by which God works invisibly in us, but only in such as worthily receive it,—in them alone it has a wholesome effect; and that, without reference to the qualification of the recipient, it is not in itself an effectual sign of Grace; that infants baptized, and dying before actual sin, are certainly saved; but that in no case is Regeneration in Baptism unconditional.

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These being, as we collect them, the opinions of Mr. Gorham, the question which we have to decide is, not whether they are theologically sound or unsound,—not whether, upon some of the doctrines comprised in the opinions, other opinions opposite to them may or may not be held with equal or even greater reason by other learned and pious ministers of the Church;—but whether these opinions now under our consideration are contrary or repugnant to the doctrines which the Church of England, by its Articles, Formularies, and Rubrics, requires to be held by its Ministers, so that upon the ground of those opinions the Appellant can lawfully be excluded from the Benefice to which he has been presented.

Its test.

This question must be decided by the Articles and Liturgy, and we must apply to the construction of those Books the same rules which have long been established, and are by the law applicable to the construction of all written instruments. We must endeavour to attain for ourselves the true meaning of the language employed, assisted only by the consideration of such external or historical facts as we may find necessary to enable us to understand the subject-matter to which the instruments relate, and the meaning of the words employed.

Rules and
 principles of
 construction.

In our endeavours to ascertain the true meaning and effect of the Articles, Formularies, and Rubrics, we must by no means intentionally swerve from the old-established rules of construction, or depart from the principles which have received the sanction and approbation of the most learned persons in time past, as being on the whole the best calcu-

MARCH 8. *Gorham v. Bp. of Exeter.* slated to determine the true meaning of the documents to be examined. If these principles are not adhered to, all the rights, both spiritual and temporal, of her Majesty's subjects would be endangered.

As the subject-matter is doctrine, and its application to a particular question, it is material to observe that there were different doctrines or opinions prevailing or under discussion at the times when the Articles and Liturgy were framed, and ultimately made part of the law ; but we are not to be in any way influenced by the particular opinions of the eminent men who propounded or discussed them ; or by the authorities by which they may be supposed to have been influenced ; or by any supposed tendency to give preponderance to Calvinistic or Arminian doctrines. The Articles and Liturgy, as we now have them, must be considered as the final result of the discussion which took place—not the representation of the opinions of any particular men, Calvinistic, Arminian, or any other ; but the conclusion which we must presume to have been deduced from a due consideration of all the circumstances of the case, including the sources from which the declared doctrine was derived, and the erroneous opinions which were to be corrected.

It appears from the resolutions and discussions of the Church itself, and from the history of the time, that, from the first dawn of the Reformation until the final settlement of the Articles and Formularies, the Church was harassed by a great variety of opinions respecting Baptism and its efficacy, as well as upon other matters of doctrine.

The Church, having resolved to frame Articles of Faith, as a means of avoiding diversities of opinion and establishing consent touching true religion, must be presumed to have desired to accomplish that object as far as it could, and to have decided such of the questions then under discussion as it was thought proper, prudent, and practicable to decide ; but it could not have intended to attempt the determination of all the questions which had arisen or might arise, or to include in the Articles an authoritative statement of all Christian doctrine ; and in making the necessary selection of those points which it was intended to decide, regard was

had to the points which were deemed to be most important to be made known to, and to be accepted by, the members of the Church, and to those questions upon which the members of the Church could agree, and that other points and other questions were left for future decision by competent authority, and in the meantime to the private judgment of pious and conscientious persons.

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Under such circumstances, it would perhaps have been impossible, even if it had been thought desirable, to employ language which did not admit of some latitude of interpretation: if the latitude were confined within such limits as might be allowed without danger to any doctrine necessary to Salvation, the possible or probable difference of interpretation may have been designedly intended even by the framers of the Articles themselves; and in all cases in which the Articles, considered as a test, admit of different interpretations, it must be held that any sense of which the words fairly admit may be allowed, if that sense be not contradictory to something which the Church has elsewhere allowed or required—and in such a case it seems perfectly right to conclude that those who impose the test command no more than the form of the words employed in their literal and grammatical sense conveys or implies; and that those who agree to them are entitled to such latitude or diversity of interpretation as the same form admits.

If it were supposed that all points of doctrine were decided by the Church of England, the law could not consider any point as left doubtful. The application of the law, or of the doctrine of the Church of England, to any theological question which arose, must be the subject of decision; and the decision would be governed by the construction of the terms in which the doctrine of the Church is expressed, viz. the construction which on the whole would seem most likely to be right.

But if the case be, as undoubtedly it is, that in the Church of England many points of theological doctrine have not been decided, then the first and great question which arises in such cases as the present is, whether the disputed point is or was meant to be settled at all, or whether it is

MARCH 8. left open for each member of the Church to decide for himself, according to his own conscientious opinion. If there be
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Bp. of Exeter. any doctrine on which the Articles are silent, or ambiguously expressed, so as to be capable of two meanings, we must suppose that it was intended to leave that doctrine to private judgment, unless the Rubrics and Formularies clearly and distinctly decide it. If they do, we must conclude that the doctrine so decided is the doctrine of the Church. But, on the other hand, if the expressions used in the Rubrics and Formularies are ambiguous, it is not to be concluded that the Church meant to establish indirectly as a doctrine that which it did not establish directly as such by the Articles of Faith—the Code avowedly made for the avoiding of diversities of opinions, and for the establishing of consent touching true religion.

Whence the doctrine of the Church is to be deduced. We must proceed, therefore, with the freedom which the administration of the law requires, to examine the Articles and the Prayer Book, for the purpose of discovering what it is, if anything, which, by the law of England, or the doctrine of the Church of England as by law established, is declared as to the matter now in question; and to ascertain whether the doctrine held by Mr. Gorham, as we understand it to be disclosed in his examination, is directly contrary or repugnant to the doctrine of the Church.

Considering, first, the effect of the Articles alone, it is material to observe, that very different opinions as to the Sacrament of Baptism were held by different promoters of the Reformation, and that great alterations were made in the Articles themselves upon that subject. The Articles about religion drawn up in 1536 state that it is offered unto all men, as well infants as such as have the use of reason, that by Baptism they shall have remission of sin and the grace and favour of God; that the promise of grace and everlasting life (which promise is adjoined to the Sacrament of Baptism) pertaineth not only to such as have the gift of reason, but also to infants, innocents, and children; and that they ought, therefore, and must needs be baptised; and that by the Sacrament of Baptism they do also obtain remission of their sin, the grace and favour of God, and be

made thereby the very sons and children of God ; in so much as infants and children dying in their infancy shall undoubtedly be saved thereby, and else not. That infants must needs be christened, because they be born in original sin, which sin must needs be remitted, which cannot be done but by the Sacrament of Baptism, whereby they receive the Holy Ghost, which executes His grace and efficacy in them, and cleanseth and purifieth them from sin by His secret virtue and operation ; and that men or children, having the use of reason, and willing and desirous to be baptized, shall by the virtue of that Holy Sacrament obtain the grace and remission of all their sins, if they shall come thereto perfectly and truly repentant and contrite of all their sins before committed, and also perfectly and constantly confessing and believing all the Articles of our Faith ; and, finally, if they shall also have firm credence and trust in the promise of God adjoined to the said Sacrament,—that is to say, that in and by this said Sacrament which they shall receive, God the Father giveth unto them, for His Son Jesus Christ's sake, remission of all their sins, and the grace of the Holy Ghost, whereby they be newly regenerated and made the very children of God, &c.

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In the book entitled *A Necessary Doctrine for any Christian Man*, and called "The King's Book," which was published in 1543, it is thus stated,—“Because all men be born sinners,”—“and cannot be saved without remission of their sin, which is given in Baptism by the working of the Holy Ghost, therefore the Sacrament of Baptism is necessary for the attaining of Salvation and everlasting life.”—“For which causes also it is offered, and pertaineth to all men, not only such as have the use of reason, in whom the same *duly received* taketh away and purgeth all kind of sins, both original and actual, committed and done before their Baptism ; but also it appertaineth and is offered unto infants, which, because they be born in original sin, have need, and ought to be christened, whereby they, being offered in the *faith of the Church*, receive forgiveness of their sins, and such grace of the Holy Ghost, that if they die in the state of their infancy, they shall thereby undoubtedly be saved. Because

MARCH 8. as well this Sacrament of Baptism, as all other Sacraments instituted by Christ, have all their virtue, efficacy, and strength by the Word of God, which by His Holy Spirit worketh all the graces and virtues which be given by the Sacraments, to all those that worthily receive the same.”

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The Articles of 1552 and 1562 adopt very different language from the Articles of 1536, and have special regard to the qualification of worthy and right reception.

The twenty-fifth Article of 1562 distinctly states, that in such only as worthily receive the same the Sacraments have a wholesome effect or operation. The Article on Baptism, in describing the blessings conferred by it, speaks only of those who *receive it rightly*; and with respect to infants, instead of saying, in the language of the Articles of 1536, that “they obtain remission of their sins, and the grace and favour of God, by Baptism, and that, dying in their infancy, they shall be undoubtedly saved thereby, and else not;” it declares only, “that the Baptism of young children is in anywise to be retained in the Church, as most agreeable with the institution of Christ;” stating nothing distinctly as to the state of such infants, whether baptized or not.

The Articles of 1536 had expressly determined two points. 1. That baptized infants dying before the commission of actual sin were undoubtedly saved thereby. 2. That unbaptized infants were not saved.

The Articles of 1562 say nothing expressly upon either point; but, not distinguishing the case of infants from that of adults, state in general terms that those who receive Baptism rightly have the benefits there mentioned conferred.

What is signified by *right reception* is not determined by the Articles. Mr. Gorham says, that the expression always means or implies a fit state to receive,—viz., in the case of adults, “with faith and repentance,” and in the case of infants, “with God’s grace and favour.”

On a consideration of the Articles, it appears that, besides this particular point, there are others which are left undecided. It is not particularly declared what is the distinct meaning and effect of the Grace of Regeneration,—whether it is a change of nature, a change of condition, or a change

of the relation subsisting between sinful man and his Creator; and there are other points which may very plainly be open to different considerations in different cases.

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Upon the points which were left open, differences of opinion could not be avoided, even amongst those who sincerely subscribed to the Articles; and that such differences amongst such persons were thought consistent with subscription to the Articles, and were not contemplated with disapprobation, appears from a passage in the Royal Declaration, now prefixed to the Articles, and which was first added in the reign of King Charles I., long after the Articles were finally settled:—"Though some differences have been ill raised, yet we take comfort in this, that all clergymen within our realm have always most willingly subscribed to the Articles established; which is an argument to us that they all agree in the true usual literal meaning of the said Articles, and that even in those curious points in which the present differences lie, men of all sorts take the Articles of the Church of England to be for them, which is an argument, again, that none of them intend any desertion of the Articles established."

If the Articles which constitute the Code of Faith, and from which any differences are prohibited, nevertheless contain expressions which unavoidably admit of different constructions,—and members of the Church are left at liberty to draw from the Articles different inferences in matters of faith not expressly decided, and upon such points to exercise their private judgments,—we may reasonably expect to find such differences of opinion allowable in the interpretation of the devotional Services, which were framed, not for the purpose of determining points of faith, but of establishing (to use the expression of the Statute of Elizabeth) an uniform Order of Common Prayer, and of the Administration of Sacraments, Rites, and Ceremonies of the Church of England.

In considering the Book of Common Prayer, it must be observed that there are parts of it which are strictly dogmatical, declaring what is to be believed or not doubted; parts which are instructional; and parts which consist of

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devotional exercises and services. Those parts which are in their nature dogmatical must be considered as declaratory of doctrine; but as to those parts which are devotional, consisting of prayers framed for the purpose of being "more earnest, and fit to stir Christian people to the due honouring of Almighty God," some further consideration is necessary.

It seems to be properly said, that the received Formularies cannot be held to be evidence of faith or of doctrine, without reference to the distinct declarations of doctrine in the Articles, and to the faith, hope, and charity by which they profess to be inspired or accompanied; and there are portions of the Liturgy which it is plain cannot be construed truly without regard to these considerations. For the proof of this, the instance which seems to be most usually cited, and which is conclusive, is the Service for the Burial of the Dead. So far as our knowledge or powers of conception extend, there are and must be at least some persons, not excommunicated from the Church, who, having lived lives of sin, die impenitent—nay, some who perish and die in the actual commission of flagrant crimes; yet in every case, in the Burial Service, as the earth is cast upon the dead body, the priest is directed to say, and doth say, "Forasmuch as it hath pleased Almighty God, of His great mercy, to take unto Himself the soul of our dear brother here departed, we therefore commit his body to the ground, earth to earth, ashes to ashes, dust to dust, in sure and certain hope of the resurrection to eternal life;" and thanks are afterwards given, "For that it hath pleased Almighty God to deliver this our brother out of the miseries of this sinful world;" and this is followed by a Collect, in which it is prayed, "that when we shall depart this life we may rest in God, as our hope is that this our brother doth." The hope here expressed is the same "sure and certain hope of the resurrection to eternal life" which is stated immediately after the expression, "it hath pleased Almighty God, of His great mercy, to take to Himself the soul of our brother here departed."

In this Service, therefore, there are absolute expressions implying positive assertions; yet it is admitted that they cannot be literally true in all cases, but must be construed in

a qualified or charitable sense,—justified, we may believe, by a confident hope and reliance that the expression is literally true in many cases, and may be true even in the particular case in which to us it seems improperly applied. From this and other cases of the like kind, of which there are several in the Services, it seems manifest that devotional expressions, involving assertions, must not as of course be taken to bear an absolute and unconditional sense. The meaning must be ascertained by a careful consideration of the nature of the subject, and of the true doctrine applicable to it.

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If expressions in devotional exercises, and exhortations which imply or convey assertions which may be true in any case, and which we are permitted in charity to hope may be true in the particular cases to which we are directed to apply them, were such that the assertions must be accepted as universal propositions necessarily and unconditionally true in all cases, they would amount to declarations of doctrine: but in the Service for the Burial of the Dead, such implied assertions are clearly not to be taken to be universal propositions; and it is plain that other assertions of the like kind, in other Services, may fall within the same category.

In the Office for the Administration of the Public Baptism of Infants, the first Rubric states the reasons why it is convenient that the administration should be when the most number of people come together. The reasons are stated to be, “as well for that the congregation there present may testify the receiving of them that be newly baptized into the number of Christ’s Church; as also because, in the baptism of infants, every man present may be *put in remembrance of his own profession made to God in his baptism.*” There is a prayer for the infant, that he (being delivered from wrath) “may be received into the ark of Christ’s Church; and being stedfast in faith, joyful through hope, and rooted in charity, may so pass the waves of this troublesome world,” that he may come to everlasting life; another prayer, that the infant coming to God’s Holy Baptism may receive remission of his sins by Spiritual Regeneration; an exhortation to the congregation, or to those present, not to doubt, but earnestly

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Bp. of Exeter. "Wherefore, we being thus persuaded of the goodwill of our heavenly Father towards this infant, and nothing doubting but that He *favourably alloweth this charitable work of ours in bringing this infant to His holy baptism*, let us faithfully and devoutly give thanks unto Him;" and in the prayer which follows, it is thus expressed: "Give Thy Holy Spirit to this infant, that he may be born again, and be made an heir of everlasting Salvation." Before the ceremony is performed, the sponsors are questioned, and make their answers; and then comes the prayer, in which it is said, "Regard, we beseech Thee, the supplications of thy congregation; sanctify this water to the mystical washing away of sin, and grant that this child, now to be baptized therein, may receive the fullness of thy grace, and ever remain in the number of thy faithful and elect children." Thus studiously, in the introductory part of the service, is prayer made for the grace of God, that the child may receive remission of his sin by Spiritual Regeneration—so firm is the belief expressed that God will favourably receive the infant; so confident is the negation of all doubt but that God favourably alloweth the charitable work of bringing the infant to Baptism. All this is before the ceremony is actually performed; and after the Baptism has been administered, and during the continuance, there is the same persuasion, and the same undoubting confidence of a favourable reception and allowance; and the priest is directed to say: "Seeing now that this child is regenerate, and grafted into the Church, let us give thanks unto Almighty God for these benefits;" and after repeating the Lord's Prayer, thanks are thus given:—"We yield Thee hearty thanks, that it hath pleased Thee to regenerate this infant with thy Holy Spirit, to receive him for thine own child by adoption, and to incorporate him into thy Holy Church." The Service is followed by the Rubric,—*"It is certain by God's Word, that children which are baptized, dying before they commit actual sin, are undoubtedly saved."* And to the short form for the administration of Private Baptism of children in houses, after a

thanksgiving, For that it hath pleased God to regenerate the infant with His Holy Spirit, and to receive him as his own child by adoption, and to incorporate him into His Holy Church, there is appended a Rubric, — “And let them not doubt but that the child so baptized is lawfully and sufficiently baptized, and ought not to be baptized again.” And if the child has not been so baptized by the minister of the parish, but by some other, the minister of the parish is to inquire by whom, with what matter, and with what words the child was baptized; and if satisfied, he is to certify that all is well done, and that the child “being born in original sin, and in the wrath of God, is now, by the laver of Regeneration in Baptism, received into the number of the children of God, and heirs of everlasting life.”

The Baptism thus referred to, and the effect of which is thus stated or expressed, is a Baptism which may have taken place without any prayer for grace, or any sponsors; but it seems plainly to have been intended only for cases of emergency, in which death might probably prevent the ceremony, if not immediately performed; for such occasions, and the child dying, the Church holds the Baptism sufficient, and not to be repeated. One Baptism for the remission of sins is acknowledged by the Church; nevertheless, if the child, which is after this sort baptized, do afterwards live, the Rubric declares the expediency of bringing it into the Church, and appoints a further ceremony with sponsors. The Private Baptism of infants is an exceptional case, provided for an emergency, and for which, if the emergency passes away, although there is to be no repetition of the Baptism, a full service is provided. The adult person is not pronounced regenerate until he has first declared his faith and repentance; and before the act of infant baptism, the child is pledged by its sureties to the same conditions of faith and repentance. And these requirements of the Church, in her complete and perfect Service, ought, upon a just construction of all the Services, to be considered as the Rule of the Church, and taken as proof that the same promise, though not expressed, is implied in the exceptional case, when the rite is administered in the expectation of

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immediate death, and the exigency of the case does not admit of sureties. Any other conclusion would be an argument to prove that none but the imperfect and incomplete ceremony allowed in the exceptional case *would be necessary in any case.*

This view of the Baptismal service is, in our opinion, confirmed by the Catechism, in which, although the respondent is made to state that in his Baptism he was "made a member of Christ, the child of God, and an inheritor of the kingdom of heaven," it is still declared that repentance and faith are required of persons to be baptized; and when the question is asked, "Why then are infants baptized, when by reason of their tender age they cannot perform them?" the answer is,—not that infants are baptized because by their innocence they cannot be unworthy recipients, or cannot present an obex or hinderance to the Grace of Regeneration, and are therefore fit subjects for Divine Grace,—but, "because they promise them both by their sureties, which promise when they come to age themselves are bound to perform." The answer has direct reference to the condition on which the benefit is to depend, and the whole Catechism requires a charitable construction such as must be given to the expression, "God the Holy Ghost, who sanctifieth me and all the elect people of God."

It seems unnecessary for us to go through the other Formularies in the Prayer Book. The Services abound with expressions which must be construed in a charitable and qualified sense, and cannot with any appearance of reason be taken as proofs of doctrine. Our principal attention has been given to the Baptismal Services; and those who are strongly impressed with the earnest prayers which are offered for the Divine blessing and the grace of God, may not unreasonably suppose that the grace is not necessarily tied to the rite; but that it ought to be earnestly and devoutly prayed for, in order that it may then, or when God pleases, be present to make the rite beneficial.

One of the points left open by the Articles is determined by the Rubric,—“It is certain by God’s Word that children which are baptized, dying before they commit actual sin,

are undoubtedly saved." But this Rubric does not, like the Article of 1536, say that such children are saved by Baptism; and nothing is declared as to the case of infants dying without having been baptized.

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There are other points of doctrine respecting the Sacrament of Baptism which we are of opinion are, by the Rubrics and Formularies (as well as the Articles), capable of being honestly understood in different senses; and consequently we think that, as to them, the points which were left undetermined by the Articles are not decided by the Rubrics and Formularies; and that, upon these points, all ministers of the Church, having duly made the subscriptions required by law (and taking Holy Scripture for their guide), are at liberty honestly to exercise their private judgment without offence or censure.

Upright and conscientious men cannot in all respects agree upon subjects so difficult; and it must be carefully borne in mind, that the question, and the only question, for us to decide is, whether Mr. Gorham's doctrine is contrary or repugnant to the doctrine of the Church of England as by law established. Mr. Gorham's doctrine may be contrary to the opinion entertained by many learned and pious persons,—contrary to the opinion which such persons have, by their own particular studies, deduced from Holy Scripture—contrary to the opinion which they have deduced from the usages and doctrines of the primitive Church—or contrary to the opinion which they have deduced from uncertain and ambiguous expressions in the Formularies: still, if the doctrine of Mr. Gorham is not contrary or repugnant to the doctrine of the Church of England as by law established, it cannot afford a legal ground for refusing him institution to the Living to which he has been lawfully presented.

This Court, constituted for the purpose of advising Her Majesty in matters which come within its competency, has no jurisdiction or authority to settle matters of faith, or to determine what ought in any particular to be the doctrine of the Church of England. Its duty extends only to the consideration of that which is by law established to be the doc-

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trine of the Church of England, upon the true and legal construction of her Articles and Formularies; and we consider that it is not the duty of any Court to be minute and rigid in cases of this sort. We agree with Sir William Scott in the opinion which he expressed in *Stone's case*,* in the Consistory Court of London,—“That if any Article is really a subject of dubious interpretation, it would be highly improper that this Court should fix on one meaning, and prosecute all those who hold a contrary opinion regarding its interpretation.”

In the examination of this case, we have not relied upon the doctrinal opinions of any of the eminent writers by whose piety, learning, and ability the Church of England has been distinguished; but it appears that opinions, which we cannot in any important particular distinguish from those entertained by Mr. Gorham, have been propounded and maintained, without censure or reproach, by many eminent and illustrious prelates and divines who have adorned the Church from the time when the Articles were first established. We do not affirm that the doctrines and opinions of Jewell, Hooker, Ussher, Jeremy Taylor, Whitgift, Pearson, Carleton, Prideaux, and many others, can be received as evidence of the doctrine of the Church of England; but their conduct, unblamed and unquestioned as it was, proves at least the liberty which has been allowed in maintaining such doctrine. Bishop Jewell writes,—“This marvellous conjunction and incorporation with God is first begun and wrought by faith; afterwards the same incorporation is assured to us, *and increased by Baptism*.” Hooker writes, “We justly hold Baptism to be the door of an actual entrance into God’s house—the first apparent beginning of life—a seal, perhaps, of the *Grace of Election before received*; but to our sanctification, a step which has not any other before it.” Archbishop Ussher, in reply to the question, “What say you of infants baptized that are born in the Church? Doth the inward grace in their Baptism always attend the outward sign?” answers—“Surely no; the

* *King’s Proctor v. Stone*, 1 Hagg. C. R. 429.

Sacrament of Baptism is effectual only *to those, and to all those*, who belong to the Election of Grace." Bishop Jeremy Taylor says, "Baptism and its *effect may be separated*, and do not always go in conjunction. The effect may be before, and, therefore, much rather may it be after, its susception: the Sacrament operating in the virtue of Christ, even as the spirit shall move."

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There was even a time when doctrine to this effect was required to be studied in our Church; and Whitgift, by a circular issued in the year 1586, enforced an order made in the year 1587, whereby every minister under the degree of Master of Arts was required to study and take for his model the *Decades of Bullinger*, as presented by the Queen and the Upper House of Convocation. And there it is declared, amongst numerous passages of a like tendency, "The first beginning of our uniting in fellowship with Christ is not wrought by the Sacraments—in Baptism, *that is* sealed and confirmed to infants, which they had before."

So with respect to the charitable interpretation of divine services, Hooker says, "The Church speaks of infants, as the rule of charity alloweth both to speak and to think." Bishop Pearson says, "When the means are used, without something appearing to the contrary, we ought to presume of the good effect." Bishop Carleton says, "All that receive Baptism are called the children of God, regenerate, justified; for to us they must be taken for such in charity until they show themselves other." And Bishop Prideaux says, "Baptism only pledges an external and sacramental regeneration, while the Church in charity pronounces that the Holy Spirit renders an inward regeneration."

We express no opinion upon the theological accuracy of these opinions, or any of them. The writers whom we have cited are not always consistent with themselves, and other writers of great eminence and worthy of great respect have held and published very different opinions. But the mere fact that such opinions have been propounded and maintained by persons so eminent and so much respected, as well as by very many others, appears to us sufficiently to

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 Formularies has been actually enjoyed and exercised by the
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Bp. of Exeter. members and ministers of the Church of England.

The case not requiring it, we have abstained from expressing any opinion of our own upon the theological correctness or error of the doctrine of Mr. Gorham, which was discussed before us at such great length and with so much learning. His Honour the Vice-Chancellor Knight Bruce dissents from the opinion we have formed; but all the other members of the Judicial Committee who were present are unanimously agreed in opinion—that the doctrine held by Mr. Gorham is not contrary or repugnant to the declared doctrine of the Church of England as by law established; and that Mr. Gorham ought not by reason of the doctrine held by him to have been refused admission to the Vicarage of Brampford Speke. And we shall, therefore, humbly report to Her Majesty, that the sentence pronounced by the learned Judge in the Arches Court of Canterbury ought to be reversed; and that it ought to be declared that the Lord Bishop of Exeter has not shown sufficient cause why he did not institute Mr. Gorham to the said Vicarage.

Sentence appealed from reversed.

Cause remitted.

We shall therefore humbly advise Her Majesty to remit the cause, with that declaration, to the Arches Court of Canterbury, to the end that right and justice may there be done in this matter, pursuant to the said declaration.*

(The Report was approved and confirmed by Her Majesty in Council on the ensuing day, the 9th March).

Proctors:—*Bowdler*, for the Appellant; *Toller*, for the Respondent.

* The Committee consisted of Lord Campbell, Lord Langdale (M.R.), Mr. Baron Parke, Sir J. L. Knight Bruce (V.C.), Dr. Lushington, and Mr. T. Pemberton Leigh. The Archbishops of Canterbury and York, and the Bishop of London, sat as Privy Counsellors and Assessors only. The Lord President (the Marquess of Lansdowne) was present on the first day of the Argument, and on the day when the judgment was delivered.

Prerogative Court of Canterbury.

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Caveat Day.

IN THE GOODS OF ELIZABETH WOOD, SPINSTER, DEC. A codicil not signed at the foot or end.
 —*Motion, ex-parte.*—The deceased died 17th February, 1850, having made her will, with three codicils, bearing date respectively the 21st November, 1835, the 14th July, 1848, the 6th January, 1848, and the 14th February, 1850. The will was formally executed. The first codicil was signed by the testatrix, in a diagonal direction, at the lower part of the attestation-clause, which was written, on the left hand side, beneath the *testimonium*-clause, at the conclusion of the codicil. The second codicil was a scrap of paper, in her handwriting, duly signed by the testatrix, and attested by witnesses; it referred to a writing on the back, dated 7th April, 1847, as “her writing.” The third codicil concluded on the second side of the paper, about one-fifth part of that side being blank, and in the middle of the third side was the attestation-clause (subscribed by the witnesses), opposite to the lower part of which was the signature of the testatrix. By this codicil she purported to revoke the appointment of her brother, J. W., named an executor in the will, and to substitute her nephew, T. B., as executor.

Dr. Deane moved for probate of the papers.

MOTION.

SIR H. JENNER FUST.

DECREE.

I am of opinion that the will and first two codicils are duly executed, and I decree probate of them, except what is written at the back of the second codicil; but the third codicil cannot be distinguished from the case of *Smee v. Bryer*,* and I reject that codicil.

Robarts, Proctor.

* 6 Notes of Ca. Supp. xli.

MARCH 19. IN THE GOODS OF WILLIAM LEWIS, DEC.—*Motion, ex-*

A codicil, in terms, apparently, but not intentionally, revoked, admitted to probate.

parte.—The deceased died 11th December, 1849, possessed of personal property under £10,000, leaving a will and six codicils. By his will, dated 12th June, 1843, he gave, *inter alia*, to his son H. L., a legacy of £50, and, with certain conditions, a legacy of £2,000. By the first codicil, dated 13th December, 1844, he revoked the legacy of £2,000 to H. L., and gave him £1,000 in lieu thereof; and he also revoked a legacy of £50 to his son F. L., and the bequest of a moiety of his leasehold property, and bequeathed a moiety of the rents of the same to trustees for the benefit of the wife and children of his son F. L., the value of such moiety being £192 per annum. By a second codicil, dated 17th March, 1845, he bequeathed and directed as follows: “Whereas I have by my former codicil to my will, dated the 13th December, 1844, revoked the bequest in my will as regards a moiety of my leasehold property to my son F. L., in so much that I have by such codicil revoked the life-interest by my will given to my son F. L., and have declared that the same moiety should be held by my trustees in such codicil named for the benefit of the wife and children of my son F. L., as if he were actually then dead; now I do hereby declare my will and intention to be, that the same moiety shall be so held by my trustees as therein mentioned, but subject to the payment unto my son H. L. of £80 per annum out of the said moiety; and I hereby give and bequeath unto my son H. L. the said sum of £80 per annum, in addition to what I may have already bequeathed to him; and I further direct that the balance of the said moiety, after the payment of the said £80 per annum, so given to my son H. L., shall be paid to E. L., the present wife of my son F. L., towards the support of herself and her children by my son F. L.; in all other respects, I hereby confirm my will and former codicil, excepting so far as altered by this my codicil.” Upon the death of his son H. L., the testator, on the 5th June, 1847, made a fifth codicil, wherein, after reciting “Whereas I have by a former will and codicil given to my late son H. L. £80 per annum, payable from the rents of my houses; also the sum

of £1,000 and the sum of £50," he proceeded: "I do hereby revoke such codicil, in consequence of the death of my late son H. L., and give to my son F. L. the said sum of £80 per annum, for the benefit of his wife and children; I also give the said sum of £1,050 as follows, that is to say, £350 to my daughter M., £350 to my son F., for the benefit of his wife and children, and £350 to my daughter E., for the benefit of herself and children; and I also hereby declare my wish to be, that my said son F. do collect the rents of my houses as they become due, and pay one moiety thereof to my daughter E.;" and he appoints his son F. L. a trustee and executor, bequeathing the residue equally between him and his daughters M. and E.

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Lewis, dec.

The question was, whether the testator had not, by the words "I hereby revoke such codicil," in the fifth codicil, revoked entirely the second codicil.

Dr. Addams moved for administration, with the will and *Motion*. six codicils annexed, to the daughter E., one of the residuary legatees named in the last codicil; contending that the testator plainly intended only to transfer the £80 per annum, given by the second codicil to his late son H. L., who had died in the interval, to his son F. L.

SIR H. JENNER FUST.

DECEED.

Under the circumstances, I am of opinion that the testator's intention was not to revoke altogether the second codicil, but merely the bequests given to his late son H. L.

(Motion granted.)

F. Clarkson, Proctor.

IN THE GOODS OF JAMES HANNAM, DEC.—*Motion, ex-* Contradictory
parte.—The deceased died on the 25th November, 1849, affidavits made
having made his will, dated 27th July, 1848, appointing by an attesting
J. B. (since deceased) and J. A. executors. The will was witness to a
executed by the deceased in the presence of T. B., the will relative to
writer, and of the two executors, and the execution was its execution.
attested by T. B. and J. B., the executor since deceased.

MARCH 19. After the will had been so executed, a conversation arose between them (the two witnesses) as to whether J. B., being an executor, could be a legal witness to the execution of the will, and the conclusion being that he could not, it was arranged by the testator and T. B., that J. B.'s name should be erased, which was done, and it was then suggested by T. B. that, as one W. B. was conversant with the testator's signature, he should be asked to affix his name to the will as a witness, and this suggestion having been approved by the testator, T. B. on the same evening saw W. B., who signed his name to the will as a witness immediately above the name of T. B., who carried the will back and delivered it to the testator. The property was under £300.

Hannam, dec.

The attestation-clause of the will subscribed by the witnesses was to the following effect: "Signed, sealed, published, and declared by the said testator, James Hannam, and for his last will and testament, in the presence of our names as witnesses hereto." The imperfect wording of this clause, and the appearance of the paper, occasioned a call for 'an affidavit from the attesting witnesses. In his first affidavit, dated 15th December, 1849, T. B. distinctly swore, "that, on the 27th day of July, 1848, the testator duly executed his will, by signing his name at the foot or end thereof, in the presence of this deponent and of W. B., the other subscribed witness thereto, both of whom were present at the same time, and this deponent and the said W. B. thereupon attested and subscribed the said will in the presence of the said testator and of each other;" and, referring to the erasure of the name of J. B., he made oath that it "was made at the time of the execution of the said will, in consequence of the said J. B. having first signed his name there by mistake." In a second affidavit, dated 2nd February, 1850, the same witness swore that, at the execution of the will, the testator requested him and J. B. to attest it; "that the deponent and J. B. did then, in the presence of the deceased, and in the presence of each other, sign the attestation to the will as witnesses to the due execution thereof; that, after the will was so duly executed, a conversation arose between J. B. and the deponent, in the

presence of the deceased and J. A., as to whether J. B. was a legal witness (he being named one of the executors), and after considerable discussion it was determined that J. B. was not a legal witness, and it was arranged by the deceased and the deponent that J. B.'s name should be erased, and the deponent accordingly, in the presence of the deceased, and J. B. and J. A., erased the same; that, after the erasure was so made, it was suggested by the deponent, that, as two witnesses were necessary, he should see W. B., who was conversant with the deceased's signature, and get him to affix his name as a witness to the signature of the deceased to the will; that the deceased fully approved of such advice, and the deponent put the will in his pocket, and on the same evening saw W. B., who, on being fully informed of the circumstances, signed his name to the will, which the deponent carried to the deceased, and showed him the signature of W. B., at which he appeared satisfied."

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Hannam, dec.

Dr. Bayford moved for probate of the will as it originally stood, with the name J. B. as a witness, and without that of W. B.; but the Court required an explanation of the two contradictory affidavits. T. B. could, however, give no further explanation than that, a year and a half having gone by, he had quite forgotten the circumstances, until they were brought to his recollection by W. B.'s saying that he did not see the testator sign.

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The COURT ultimately granted the Motion.

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Toker, Proctor.

IN THE GOODS OF THE HON. AND REV. THOMAS DAWNAY, DEC.—*Motion, ex-parte.*—The deceased died 8th January, 1850, leaving a will (prepared by a solicitor) dated 30th September, 1847, consisting of five sheets, each of which was signed by him. The *testimonium*-clause and date brought the conclusion of the will very low down the fifth sheet; immediately following the conclusion, on the

Signature of the testator, below the attestation - clause, and the signatures of the witnesses, — held to be at the foot or end of the will.

MARCH 19. left-hand side, was a formal attestation-clause, subscribed by two witnesses (one of them the drawer of the will), below whose signatures (to the right hand), about an inch from the end of the clause, but two inches below the conclusion of the *testimonium*-clause, was the signature of the deceased. The personal property amounted to £80,000.

MOTION. *Dr. Deane* moved for probate.

DECREE. **SIR H. JENNER FUST.**

This will was prepared by a solicitor, and if I was called upon to pronounce, because the signature of the deceased is not immediately under the conclusion of the will, that it is not at the foot or end, within the meaning of the Statute, I should be bound to pronounce against almost all wills made by professional men; for I believe there is scarcely any will, so prepared, in which some space is not left. The only question in this case is, whether the name should not have been written a little higher up. If, in the words of the Judicial Committee of the Privy Council, in the case of *Smee v. Bryer*,* “the plain rules of common sense” are to govern my decision, common sense, in my opinion, points out that this signature is at the foot or end of the will. Decree probate of this paper to pass.

Bowdler, Proctor.

A will signed by the testator at the lower part of the attestation-clause, between which and the conclusion of the will a small blank space was left,—held to be duly executed.

IN THE GOODS OF JAMES FILGATE PRENTICE, DEC.—
Motion, ex-parte.—The deceased died 1st December, 1849, leaving a will dated 18th September, 1845, which was written on two sheets of foolscap paper, occupying the first and second sides of one sheet (each of which was signed by the deceased and the two subscribed witnesses) and part of the first side of the inner sheet, ending, “In witness whereof I have hereunto set my hand and seal this [18th September erased] in the year of our Lord one thousand eight hundred and forty [five erased] nine. This is the last will and testament.” Then, after a blank space of about three-fourths

* 6 Notes of Ca. Supp. xlii.

of an inch, appeared the attestation-clause, and signatures of the deceased and the witnesses, thus :—

MARCH 19.

Prentice, dec.

Signed, declared and published as and for his last will and testament, in the presence of us, who subscribed our names as witnesses, in the testator's presence and at his request.

James F. (Seal) Prentice, senr.

Chas. Hope.

John Gardner.

The will was endorsed : " Dated Sept'. 18th, 1845. Will of James Filgate Prentice, of King Edward Street, Islington, in the county of Middlesex, late officer of Excise."

Dr. Jenner moved for probate.—This appears to be one of those cases in which the testator himself considered the attestation-clause as part of his will. Here is an entire disposition of the property, and an appointment of executors, and the testator had no intention to add to the paper.

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MOTION.

The COURT directed the case to stand over.

SIR H. JENNER FUST.

March 19.
DECREE.

Can I say that this is not at the foot or end of the will? It is under the will. In *Smee v. Bryer*,* it was said that there was nothing immediately above the will; here there is, but a little more space is left than is necessary. I decree probate of this paper to pass.

Tatham, Proctor.

IN THE GOODS OF SARAH WELCH, WIDOW, DEC.—*Motion, ex-parte.*—The deceased died 22nd January, 1850, leaving a small personal property. Her will appeared to be duly executed, but some doubt was entertained whether the position of the signature was at the foot or end within

A will signed by a testatrix at the end of the attestation-clause, — held to be duly executed.

* 6 Notes of Ca. Supp. xli.

MARCH 19.

Welch, dec.

the meaning of the Act. The will concluded: "in witness whereof I, the said Sarah Welch [signed by her], have to this my last will and testament set my hand this 18th day of January, in the year of our Lord, 1850." Then followed, the space of a line intervening, the attestation-clause and the signatures, as follows:—

Signed by the testator
[sic] Sarah Welch, in the
presence of us, present at
the same time, who have
hereunto subscribed our
names as witnesses in the
presence of the said testa-
tor and of each other.

Sarah Welch.

Witnesses { J. C.
 { S. T.

MOTION.

Dr. Dodson, in moving for probate, urged the impossibility of inserting anything between the attestation-clause and the signature, and the Court had decided that if the signature followed the attestation-clause, this clause was to be considered a part of the will.

DECREE.

SIR H. JENNER FUST.

The signature is immediately under the attestation-clause, which immediately follows the *testimonium*-clause. Let probate of this paper pass.

Smale, Proctor.

Practice.—
Administration. — Where
a testator be-
queathed the
residue of his
property in
trust for the
benefit of his
brother, a luna-
tic, which was

IN THE GOODS OF ROBERT RANDES WOOD, DEC.—*Motion, ex-parte*.—The deceased died in 1811, leaving a will, whereof he appointed W. P. and W. H. executors, and thereby bequeathed the residue of his personal estate to his executors in trust to invest the same and pay the interest thereof towards the maintenance of his brother J. W., during his lunacy, and in case of his recovery, to pay the said trust-moneys to him; but if he continued insane until

his death, so as to be unable to make a will or disposition thereof, upon trust for his (the testator's) legal representatives. The executors proved the will, and for some time intermeddled with the effects, and died leaving some part undisposed of, W. H. having survived his co-executor, and dying intestate. In 1825, administration, with will annexed, *de bonis non*, was granted to J. D. C. and E. C., his wife, the Committees appointed by the Court of Chancery of the person and estate of J. W., the lunatic; and they for some time intermeddled with the effects of the testator, and died leaving some part unadministered, and no further administration *de bonis non* had been granted. In 1801, under a Commission *De Lunatico Inquirendo*, J. W. had been found lunatic, and his brother (the testator) was appointed Committee of his estate and effects, and continued so to act until his (the testator's) death, whereupon M. F. and — F., her husband, were appointed Committees of the person and estate of the lunatic, and in 1820, upon their death, the aforesaid J. D. C. and E. C., his wife, were appointed Committees of his person and estate. In 1848, these persons being both dead, T. C., cousin-germane by the half-blood, and only next of kin of J. W., the lunatic, was appointed Committee of his person and estate, and continued so until the death of the lunatic, the Commission not having been superseded. The said J. W. died at a lunatic asylum, on the 26th December, 1849, having continued to that time in a state of lunacy, without a lucid interval. The original testator died a bachelor, without parent, leaving J. W., his lunatic brother, only next of kin, and the sole person entitled to his personal estate in case he had died intestate. He also left surviving S. C., widow, his aunt by the half-blood, and (excepting J. W.) only next of kin. She died in 1834, a widow, intestate, leaving T. C. and G. C., her sons, and the only persons entitled to her personal estate; the latter of whom died about 1848. J. W., the lunatic, died a bachelor, leaving the above-named T. C., his cousin-germane by the half-blood, only next of kin, to whom Letters of Administration of his effects were granted 6th February, 1850. The said T. C., cousin-germane by the half-blood to

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Wood, dec.

left twice unadministered, on the death of the lunatic, administration *de bonis non*, in a special form, under the peculiar circumstances, granted to the cousin-germane of the testator.

MAY 12

Wednesday.
1846

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the original testator, was, at the death of J. H. W., the only person entitled to become his legal personal representative in case he had died intestate, and under the trusts of his will, the sole person entitled to the residue of his estate.

Dr. Bayford moved for administration, with the will annexed, *de bonis non*, of the effects of the testator, B. R. Wood, to T. C.

DECEASED.

SIR H. JENNER PUSEY.

My opinion is, that administration should be granted to him in some character. The question is, whether his mother was not next of kin of the deceased at the time of his death. There must be a special grant. It is a very nice question, whether it was the testator's intention to exclude his brother as one of the next of kin. I think that was his intention.

Oldershaw, Proctor.

Archbishop of Canterbury.

Add. Court Day.

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Restitution of
conjugal rights.
Suit by the hus-
band against
the wife. Plea
in bar by the
wife, that the
parties had
abjured the
Protestant
faith and em-
braced that of
Rome; that the
husband had
by the authority

CONNELLY v. CONNELLY.—*Allegation.*—This was a cause of restitution of conjugal rights, promoted by the Rev. Pierce Connelly, described as of Albury, Surrey, clerk, against Cornelia Augusta Connelly, described as of Hastings, Sussex, his wife. The parties, who are citizens of the United States of North America, were born at Philadelphia, and married there in 1831. They left America in 1835, to proceed to Rome; they visited various parts of the Continent of Europe, and returned to America. In 1846, Mr. Connelly was appointed chaplain to the Earl of Shrews-

bury, and took up his residence in this country; in the same year Mrs. Connelly came hither, and has since resided in England.

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Connelly vs
Connelly.

In Hilary Term, 1849, a suit for restitution was commenced by Mr. Connelly in this Court, by Letters of Request from the Court of Chichester, and an appearance having been given on behalf of Mrs. Connelly, the Libel was brought in and admitted, which pleaded the marriage of the parties (which was subsequently confessed) on the 1st December, 1831, at Philadelphia, "according to the rites and ceremonies of the Protestant Episcopal Church in the United States, the same being identical with the rites and ceremonies of the Church of England as by law established in this country," by the Bishop of Pennsylvania, in Holy Orders of the Church of England, duly consecrated by the Archbishop of Canterbury as a Bishop of that Church, and an entry of such marriage was duly made in the Register Book of Marriages kept by the said Bishop in respect of marriages solemnized in his diocese. It pleaded cohabitation, and the birth of five children (three of whom were living), until June, 1846; that, in September, 1846, they came over to this country, where they have since resided; that, in October, 1847, Mrs. Connelly, without lawful reason, withdrew from cohabitation, and still refused to return and live with her husband.

of the Pope taken Holy Orders in the Church of Rome, and the wife, after a vow of perpetual chastity, had entered a convent; that the parties by mutual consent may, under such circumstances, by the law of the Roman Catholic Church, lawfully separate, in order that they may enter into religion; that such separation, approved and allowed by the Pope, debars the parties from matrimonial cohabitation, and the Rescript of approval and allowance by the Pope, upon the religious profession of the parties, has all the force of a judicial sentence,—rejected.

On the part of the wife, an Allegation was brought in, setting up a plea in bar, which, after being partially argued, was directed to be reformed; the Judge observing that, this being a new case, *prima impressionis*, the plea should be as formal as possible, and, in its then form, not being sufficiently full, it was not admissible.

The Proctor for the wife was allowed to subduct this Allegation, and to bring in an amended Allegation, which pleaded as follows:—

1. The marriage of the parties. 2. That Mr. Connelly, who, at the time of his marriage, was a priest in Holy Orders of the Protestant Episcopal Church of the United States in America, with cure of souls, in Pennsylvania, immediately after his marriage, was appointed Rector of the Church at Natches, in the State of Mis- Allegation.

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stepped, where the parties resided until October, 1835. 3. That for some time previous to October, 1835, Mr. Connelly, and also, through his inducement, or with his perfect approval, his wife, had been disposed to become Roman Catholics, but that he was desirous in the first instance of considering the points in controversy between the two Churches with such aids as he might procure at Rome, and accordingly, in that month, he and his wife went to New Orleans, thence to embark for Europe, but they were detained for six weeks at New Orleans, where, in November, 1835, Mrs. Connelly, having become a thorough convert to the Roman Catholic faith, was unwilling to embark for Europe until she had made a formal profession of that faith, which she did at New Orleans, formally abjuring the Protestant faith, and being formally received thereon into the Roman Catholic Church; that she took that step with the full sanction and approval of her husband, who was present on the occasion of her reception, and of her making her first communion as a member of the Roman Catholic Church. 4. That in December, 1835, Mr. Connelly and his wife embarked for Europe on their way to Rome, as for the purpose aforesaid, and where they arrived on the 24th February, 1836, and that there, on Palm Sunday, 27th March, 1836, Mr. Connelly was also, on his solemn abjuration of the Protestant faith, received into the Roman Catholic Church; that, in January, 1838, they, having been resident in the interval necessarily at Rome, Vienna, and elsewhere on the Continent of Europe, returned to America, and settled at Grand Coteau, in the State of Louisiana, where they continued to reside until May, 1842. 5. That, in October, 1840, Mr. Connelly proposed to his wife that thenceforth they should live in constant and perfect chastity, abstaining from sexual intercourse with each other, in order to the more fully devoting themselves mutually to the service of God, and with a special view to Mr. Connelly's then declared wish and intention, in that case, to take Holy Orders in the Roman Catholic Church; that Mrs. Connelly acceded to such proposal, and a verbal agreement to that effect was then entered into between them, and which agreement was ever after steadfastly maintained. 6. That, in furtherance of such his declared wish and intention, and as probationary to their final separation, in May, 1842, Mr. Connelly placed his wife in the Convent of the Sacred Heart at Grand Coteau, and again left America and proceeded to Rome, for the avowed purpose of further proving himself as to his vocation to the Ecclesiastical state, and in order, if proved, to make certain preparations in that behalf antecedently necessary, in

respect of his being a married man, by the laws of the Roman Catholic Church. 7. That, in July, 1843, he returned to Philadelphia, in the neighbourhood of which place his wife rejoined him; she having for that purpose, by his order, left the convent where he had placed her; that, in August, 1843, Mr. Connelly and his wife quitted Philadelphia and again proceeded to Rome, where they arrived on the 7th December, and where they lived together in the same house, but observing perfect chastity, until the 8th April, 1844; that the sole object of their visit to Rome was the obtaining a formal decree tantamount to or being a sentence of separation from each other, such being necessary in order to their carrying out their several ulterior objects, to-wit, on the part of Mr. Connelly, that of embracing the Ecclesiastical state, or taking Holy Orders, in the Church of Rome, and on the part of his wife, that of entering into religion in that Church, or becoming a Nun; that, accordingly, a petition of Mr. Connelly, embodying the requisite statements, and setting forth such their several objects, was presented to the then Pope, Gregory XVI., and was by him referred, with all necessary faculties, to the Cardinal Vicar-General and Judge Ordinary of Rome, who, after duly examining into the facts of the case, pronounced in effect a sentence of separation accordingly, and that thereupon, on the 8th April, 1844, Mr. Connelly placed his wife in the Convent of the Sacred Heart, Trinità dei Monti, at Rome, and on the following day he entered himself in the Collegio de' Nobili in that city, and on the next day he received the first clerical tonsure, and assumed the Ecclesiastical dress. 8 and 9. Exhibit an official copy, extracted from the Register Book of Decrees of the Court of the Vicariate of Rome, of the petition presented by Mr. Connelly to the Pope, the Papal Rescript thereon, and the form of the Vow of Chastity thereby prescribed, and afterwards taken, and the proceedings had by the Cardinal Vicar and his delegate in pursuance of the petition and Rescript, with notarial translations, as follow:—

The Petition.—"Most Blessed Father, since the time when Peter Connelly, a native of Philadelphia, after having been nine years a minister of the sect of the Episcopalians, was so happy as to abjure his errors here at Rome in 1836, and to unite himself to the true Church of Jesus Christ, together with his wife, Cornelia, both of them had nothing more at heart than to live up to the sanctity of the faith they had embraced, and to follow without reserve the suggestions of that Divine Grace which had drawn them with such mercy to the only Ark of Salvation. The constant and powerful motions of this heavenly grace

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had the effect of producing the steadfast resolution which three years and a half ago they both formed, with the fullest mutual consent, to live in a state of perfect chastity, a resolution to which they have ever since adhered, in order thus to prepare themselves for the grace of the religious vocation to which they both felt themselves drawn by the Lord. During these three years, they have sought to learn still more fully the Divine Will by persevering prayers to the Giver of all Light, and by submitting themselves entirely to the guidance and counsels of enlightened and pious directors, who, in America as well as here in Rome, have always recognized in both of them the most evident signs of the heavenly call. It may suffice here to mention only the Right Reverend Bishop Flaget, of Kentucky, in whose approbation of the matter there are some extraordinary particulars. The two married parties, therefore, being now in Rome, and everything tending by the Divine Goodness to facilitate the speedy execution of their most steadfast determination, they respectfully submit to your Holiness what has been done to that end. The wife of the petitioner, being now thirty years of age, has already been accepted in the Convent of the Ladies of the Sacred Heart at Trinità dei Monti, where she will enter as a Postulant, in making at once a solemn vow of perpetual chastity. The petitioner, aged thirty-nine years, has also been graciously accepted by the Reverend the Superior General of the Society of Jesus, for the purpose of entering as a member of that body, to which he feels himself specially called by the Almighty. A provision has also been made in the most suitable manner for the education and future welfare of the three children granted to them by Divine Providence: The son, of eleven years of age, is placed at the College of Stonyhurst, in England, which is under the management of the Jesuit Fathers, and the Earl of Shrewsbury has expressly engaged to take care of him. The daughter, aged nine years, is being educated in the aforesaid Convent of the Sacred Heart here in Rome, where her mother is to take the veil. There is also a son three years of age, who will be placed in due time where he may be taken care of and be brought up with every attention, and may also receive, while his tender years require it, the assistance of his mother herself. The Prince Borghese has been pleased to take a generous interest in the future welfare of this last-mentioned child; and, besides this, the petitioner will assign a capital out of his own private estate for the benefit of each of the said children. Thus the Divine Goodness, by graciously and powerfully disposing matters to their end, now enables the two married parties to accomplish at

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once that perfect sacrifice of themselves to which the same Divine Goodness strongly impels and leads them, as was recently the case with the two married parties, Mr. and Mrs. Chaudet, natives of Switzerland, who were converted to the Catholic Faith, the one having joined the Lazarists, and the other having become a novice in the Convent of the Sacred Heart. In order to accomplish the wishes of your humble petitioner, there remains one favour which he now implores from your Holiness. With the acquiescence of the Very Reverend the Superior General of the Society of Jesus, he proposes, before entering that body, to be promoted to the priesthood, and therefore immediately afterwards, during the present Lent, to take Minor Orders. It is necessary, however, that your Holiness should be pleased to permit the petitioner to be promoted to the aforesaid Orders here in Rome, by the hands of his Eminence the Cardinal Vicar, without having recourse to the Bishop of Philadelphia for Letters Dimissory, which would occasion a very long delay, and might perhaps give rise to some embarrassments in so delicate an affair. 15th March, 1844."

The Papal Rescript.—"Upon audience of His Holiness, the 16th day of March, in the year 1844, His Holiness has graciously acceded thereto, and granted to me, the relator, the requisite faculties to this effect: that without Letters Dimissory from the Right Reverend the Bishop of Philadelphia, the petitioner may be promoted to Holy Orders, as far as to that of Presbyter inclusive, at Rome, for this special reason, that he is considered as no longer having his domicile in the Diocese from which he came, not having resided therein since his conversion to the Catholic Church. But as respects the mode and time to be appointed for his Ordination, His Holiness has considered that it will be proper to confer with the Very Reverend Father the Superior General of the Society of Jesus. Finally, he has ordered that, before the petitioner be promoted to the Holy Order of Sub-deacon, his wife must take the Vow of Chastity. C. Cardinal Vicar."

The Vow of Chastity.—"Almighty and Eternal God. I, Cornelia, the lawful wife of Peter Connolly, trusting in thine infinite goodness and mercy, and animated with the desire of serving thee more perfectly, with the consent of my husband, who intends shortly to take Holy Orders, do make to thy Divine Majesty a vow of perpetual chastity, at the hands of the Reverend Father Jean Louis Rosmin, of the Society of Jesus, delegated for this purpose by his Eminence the Cardinal Vicar of His Holiness for the city of Rome, sanctifying thy Divine Goodness, by the precious blood of Jesus Christ, to be pleased to accept this offering of thy unworthy crea-

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ture, as a sweet-smelling savour, and that as thou hast given me the desire and the power to make this offering to thee, so thou wouldest also grant me abundant grace to fulfil the same. Rome, at the Convent of the Sacred Heart of Jesus, on the 18th of the month of June, in the year 1845."

The Proceedings.—"In the name of God, Amen. His Holiness our Sovereign Lord Pope Gregory the 16th having been pleased to assent to and approve of the application made by the married parties, Peter Connelly, son of the late Henry and of the living Mrs. Elizabeth Pierce, a native of Philadelphia, who has entered the bosom of the Holy Catholic Church, after having abjured the errors of the heretical Episcopalians, in the year 1826, here in Rome, as well as that made by the same writing in behalf of his wife, Cornelia Pico, daughter of the late Raphael and of the late Maria Snopf, also of Philadelphia, the which married parties have determined to live in perfect chastity, after mature deliberation, in pursuance of the counsels of most respectable Ecclesiastics, and are now steadfast in their intention of carrying their resolution into effect; that is to say, the former, Mr. Peter Connelly, to enter into the Institute of the Society of Jesus, having been already accepted by the Very Reverend Father the Superior General of that Society, and to devote himself wholly to the Ecclesiastical state, and to be promoted to Holy Orders; and the latter, Mrs. Cornelia, to embrace the Institute of the Ladies of the Sacred Heart, having been already accepted by the Community of the Holy Trinity of Monti, in order to live in constant and perpetual chastity, having provided for the future education and subsistence of three children, Mercer, Adelina Maria, and Peter Francis; His Holiness himself, in the Audience of the 16th March last, committed all the necessary and suitable faculties to his Eminence the Most Reverend Cardinal Constantino Palisi, his Vicar-General, to the intent that, in observing the required formalities, the wishes of both petitioners may be complied with. His Most Reverend Eminence, therefore, by virtue of the aforesaid Apostolical faculties, being desirous that the pious wish of the said two married parties may be accomplished, has, by a Special Act, registered in the Archives of the Secretariat of the Vicariate, on the first day of April, deputed me, the undersigned, Promoter Fiscal of the said Tribunal, for the purpose of receiving from the aforesaid married parties, Peter Connelly and Cornelia Pico, the necessary and proper mutual consent, in conformity with the Sacred Canons, by which they may freely consent, each for his or her part, to allow of the fulfilment of the abovementioned determination to live perpe-

family in a state of perfect chastity. Mr. Peter Connelly and Mrs. Cornelia Pico having, therefore, appeared before me, at their present residence, situated in the Via di Ripetta, at the civic number 415, on the first floor, I interrogated them as to whether they are now steadfast and constant in the determination expressed and humbly represented to the Holy Father, and they having replied in the affirmative, I further interrogated them as to whether they were or are induced by any worldly respect to carry out the aforesaid determination; to which they replied that no worldly consideration had induced or does induce them thereto, but solely the Divine inspiration, and the desire of greater perfection. These protestations premised, I called upon Mrs. Cornelia Pico, the wife of Mr. Peter Connelly, freely to give her consent to her husband, Mr. Peter, and to permit him to enter the Institute of the Society, to live perpetually in perfect chastity, and to be promoted to Holy Orders, as far as to the priesthood; whereupon she gave her full consent thereto. Mr. Peter Connelly, the husband of Mrs. Cornelia Pico, being thereupon called upon to permit her to enter the Institute of the Ladies of the Sacred Heart, to live perpetually in perfect chastity, he likewise gave his full consent thereto. Their mutual consent having been pronounced, as above, to be ratified within the time of one year, or even sooner, with the requisite Special Apostolical faculties, both the married parties were called upon to sign the present Act, together with two witnesses who were present, namely, the Reverend Don Giuseppe Boccacani, Priest of the Diocese of Narni, son of Mr. Constantino and of Mrs. Maria Ventura, domiciled in the Incumbency of St. Roque, at Rome, and Mr. Robert Berkeley, of Spetchley, in Worcestershire, in England, son of Mr. Robert and of Mrs. Henrietta Benfield, domiciled in the same parish.—An Act done as above this 1st day of April, 1844.—I, Peter Connelly, give consent as above.—I, Cornelia Connelly, give consent as above.—I, Giuseppe Boccacani, was witness to the said consent.—I, Robert Berkeley, was witness to the said consent.—Francesco Anivitti, Canon, Promoter Fiscal, delegated as aforesaid.”

10. That by June, 1845, Mr. Connelly had completed his course of study, and was about to take Holy Orders in the Roman Catholic Church; that it being necessary, however, according to the Canons of the Roman Catholic Church in that behalf, that his wife should first bind herself by a solemn vow of perpetual chastity, she accordingly, on the 18th of that month, pronounced or took, with the requisite formalities, and signed, a solemn written vow (in the French language) of perpetual chastity, being the very

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view presented by the Papal Rescript as before pleaded; and that she did so with the full knowledge and approbation (testified by his signature at the foot thereof) of her husband, although she had previously warned him of the difficulties and trials of the state into which he was about to enter, and had represented to him the nature of the obligations to which he was about to bind himself irrevocably, and offered to release him from all such difficulties and trials by returning to their previous mode of life, and thereby sacrificing any wish or will of her own; that he persisted, however, notwithstanding such warnings and representations; and accordingly, on the 22nd of June, received Sub-deacon's Orders, and on the 29th, Deacon's Orders, and on the 16th July following, Priest's Orders, all of the Church of Rome, at the hands of the aforesaid Cardinal Vicar of Rome. 11. Exhibits an original duplicate of the vow of perpetual chastity pronounced or taken by Mrs. Connelly, and which is in the same terms as that pleaded in the 8th article. 12. Exhibits an official Certificate, issued by the Cardinal Vicar, of the successive ordinations of Mr. Connelly. 13. That, in May, 1846, Mr. Connelly left Rome and came to England, where he became private chaplain to the Earl of Shrewsbury; that, in the previous month, Mrs. Connelly also left Rome, in the first instance for Paris, whence, after being three months there (in the Convent of the Assumption), she also came to England, and in October following founded at Derby a Community of Religious Women (since removed to Hastings, and of which she afterwards became, and now is, the Superioress), under the title of the "Congregation of the Holy Child Jesus;" that she had brought to England Rules for the government of such (then intended) community, which had been submitted to and sanctioned by competent Ecclesiastical authority, before she quitted Rome. 14. That the time having arrived and the necessary arrangements having been made for Mrs. Connelly's completing her entrance into religion, by taking the necessary vows of poverty and obedience, supplementary to that of chastity, on the 21st December, 1847, she solemnly took the vows of poverty and obedience (at the same time renewing or repeating her former vow of perpetual chastity), in the house then occupied by the aforesaid Community at Derby, in the presence and with the sanction of the Roman Catholic Ordinary of that house and community. 15. Exhibits a copy of the vows of poverty and obedience, as follows:—

"Almighty and Everlasting God. I, Cornelia Connelly, being most unworthy of thy Divine Regard, but confiding nevertheless in thy infinite pity and mercy, and moved by the desire of serving

thee, vow, in the presence of the Most Blessed Virgin Mary, and of all the Heavenly Court, to thy Divine Majesty. Poverty and Obedience (renewing also my vow of Chastity, formerly made), in the Congregation of the Holy Child Jesus, and I promise to enter it, to live and die in it, intending to do all things according to the Constitutions of this Congregation. And this vow I make in the presence and under the sanction of the Right Reverend N. Wiseman, Bishop of Melipotamus, coadjutor of the Right Reverend the Vicar-Apostolic of the Central District, as Ordinary for the time being of this house and community. Dec. 21, Feast of St. Thomas, 1847. Cornelia Connelly."

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16. That early in (particularly in April) 1847, Mr. Connelly had been anxious, and had so expressed himself, that Mrs. Connelly should take the vows of poverty and obedience without delay; that later, however, in that year, he dissented from the said vows being so taken by his wife, on the ground that he was responsible for debts contracted by her, and himself drew up and sent to the Rev. Dr. Asperti, the spiritual director of the aforesaid community, to be by him presented, if necessary, to the Ordinary, a written protest against the vows being so taken by his wife, and which he sent to Dr. Asperti, who, a few days afterwards, met Mr. Connelly, at Alton Towers (the residence of the Earl of Shrewsbury), at his request, when the matters connected with the taking of the vows, and Mr. Connelly's expressed dissent therefrom, were discussed between them, and in the result, Mr. Connelly withdrew his protest, and signified his wish that it should not be presented to the Ordinary, or any step taken thereupon; the result of the whole being that Mrs. Connelly solemnly took the vows. 17. Exhibits the protest, which is as follows:—

"Whereas I am responsible for the payment of all debts contracted by, or in the name or with the authority of, my wife, Cornelia A. Connelly, I *hereby protest* against the said Cornelia's being required or allowed to take any vow or vows binding her to any religious Congregation whatsoever before I shall have been fully satisfied of the sure, proper, and permanent endowment and sufficient means of said Rel. Congregation. This 24th day of Nov. 1847, at Alton Towers. Pierce Connelly."

18. That, in January, 1848, Mr. Connelly again went abroad, and again visited Rome, and returned to this country in May; that in that month, or the beginning of June, he presented himself at the Convent at Derby, and required and insisted upon an interview with Mrs. Connelly; that no preventive whatever to such interview was interposed, save by Mrs. Connelly herself, who

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declined to see Mr. Connolly, and so communicated to him through the medium of Dr. Aspert, whose "affectionate sympathy" with him on that occasion Mr. Connolly afterwards (on the 5th June) acknowledged, in a note of that date. 19. Exhibits the note, which is as follows:—

"Alton Towers, June 5, 1848.

"My dear Don Samuele,—I thank you from my heart for your kind note, and its affectionate sympathy. I humbly beg your pardon for the scandal I must have given you in a moment of weakness at a blow falling on me I never had expected, and was wholly unprepared for. I shall be obliged to you to thank the Revd. Mother for the letter she was good enough to send me from my little boy, the first I have seen for more than five months. I return it to her, in case she should wish to keep it. Ever, dearest Don Samuele, in the bonds of our Lord, your faithful and affectionate, Pierre Connolly."

20. That, notwithstanding the premises, on the 25th January, 1849, Mrs. Connolly was served, at Hastings, whither the Community of which Mrs. Connolly was the Superioress had removed, with a Decree by Letters of Request from this Court in a suit for restitution of conjugal rights. 21. That the following are Rules of the Roman Catholic Church applicable to the question at issue, derived from and regulated by its written laws or canons in that behalf, and of which the principal are to be found in the Decretals, Lib. III. Tit. xxii., "*De Conversione Conjugatorum*," to wit: 1st. That a husband and wife, *post matrimonium consummatum*, may lawfully separate by mutual consent, in order that they may enter into religion severally, to wit, by the husband taking Holy Orders, and the wife making a vow of perpetual chastity, and entering a religious house, or there being professed and taking the veil. 2nd. That a separation founded on such mutual consent, and for such purposes, even after such orders have been taken and such vow or profession made, though not annulling such *matrimonium consummatum*, debars the parties *in perpetuum ab omni usu ejusdem*, and from that time forth *alter alteram repetere non potest*. 3rd. A separation of husband and wife, by mutual consent, for such views and objects as aforesaid, must be approved of and allowed by the Pope upon the petition of the parties, and his Rescript of such approval and allowance upon the religious profession of the husband and wife severally, or the ordination of the husband, and the vow or the religious profession of the wife as aforesaid, has all the force of a judicial sentence, such Rescript being deemed a conditional sentence from the time of its issue, but

having its full force and vigour from the moment that the conditions mentioned or referred to in the Rescript have been fulfilled; as is well known to the Judges and Advocates presiding or practising in Roman Catholic Ecclesiastical Courts, and others of reputation for their skill and knowledge of the law as there administered, and is also laid down by divers authors of eminence and authority on that subject.

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Dr. Bayford, for the husband, in opposition.—If the Allegation were proved, it would be no answer in law to the Libel. By the law of this country, married persons are bound to live together; the only lawful causes of separation are adultery and cruelty, and neither is alleged. *Barlee v. Barlee*.* It would be a dangerous precedent to introduce another ground of separation, that of taking Orders in the Church of Rome. It is alleged that the Cardinal Vicar-General and Judge Ordinary of Rome “pronounced in effect a sentence of separation.” But I find no such sentence. There are the petition of Mr. Connelly, the Papal Rescript, the Vow, and the proceedings; but there is no sentence of separation. When a foreign judgment is pleaded, we cannot attribute more to it than to one of our own. The documents are *nil ad rem* in this Court; so that there is in fact no judgment at all. The whole case rests on three grounds: 1st, the Orders taken by Mr. Connelly in the Roman Catholic Church; 2nd, the vows taken by Mrs. Connelly, and her position as Superioress in a religious house in England; 3rd, the private vows and consents of the parties to live in chastity. 1. Whatever regulates the Church of Rome belongs peculiarly to that Church alone, and it must be shown how we can take cognizance of the matter. Bingham† shows that no vow of celibacy was required of the clergy as a condition for Ordination during the first three ages. It never obtained in the Greek Church; the Greek clergy marry to this day. The Statutes 2 & 3 Edw. 6, c. 21, and 5 & 6 Edw. 6, c. 12, expressly repeal all laws positive, canons, constitutions, and ordinances of men which prohibit or forbid marriage to any ecclesiastical or spiritual person, and the repeal was revived and made perpetual by 2 (*vulg.* 1)

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Nov. 13.
Argument.

* 1 Add. 301. . . . † *Orig. Eccles.*, 1 vol. b. iv. c. v. s. 5.

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JAN. 25 : so that the only law and discipline known to this Court affect married clergymen. In Lyndwood there are various Constitutions* which recognize married clergy. 2. With regard to the second position, that the wife is a Superiress of a Convent or Religious House, by the Roman Catholic Relief Act,† this Court can take cognizance of Monastic Institutions, and it relieves from penalties. It is argued that the Court is to take notice of all vows relating to these institutions; but the Legislature, by exempting the parties from penalties, does not say that the Court is to take notice of their regulations. The 2 & 3 Will. 4, c. 115, for securing Charitable Donations and Bequests by Roman Catholic subjects, as construed by Lord Cottenham, in the case of *West v. Shuttleworth*,‡ does not affect gifts to priests and chapels, which are void, the Statute applying only to Roman Catholic schools, places for religious worship, education, and charitable purposes. See also Co. Litt. § *Rex v. Portington*.|| 3. With regard to the mutual vows of the parties, admitting that they did bind themselves to vows of chastity, there is nothing in the Allegation to show that if they came together to-morrow there is any intention, or any probability, of their infringing the vows. By deeds of separation parties bind themselves to live apart; but the Court does not permit such a deed to be pleaded as a bar to a suit for restitution. *Mortimer v. Mortimer*.¶ In *Orme v. Orme*** it was said that the Court, in compelling parties to live together, could proceed no farther than to require that they should reside under the same roof. There is only one instance of a departure from the general law, and that was in the case of *Molony v. Molony*,†† where the Allegation pleaded peculiar circumstances, the wife being incapable of residing in Ireland without danger to her health; and the Court admitted the Allegation. [*Per Curiam*.—The case never

* E. gr. "Wethershead," p. 198.

† 10 Geo. 4, c. 7, sec. 23, 33, and 37.

‡ 2 M. & K. 684.

|| 1 Salk. 102.

** 2 Add. 362.

§ B. ii. c. xi. § 200.

¶ 2 Hagg. C. R. 318.

†† 2 Add. 249.

went further, I believe?] "No; the Court did not pledge itself to hold that it was a bar. This Allegation must be rejected."

Dr. R. Phillimore, on the same side.—If Mrs. Connelly has any claim of exemption from the matrimonial law of this country, other persons may claim exemption on similar grounds. The first question, which governs the whole case, is, what law is to be applied to it? The Courts of this country may entertain suits between subjects of other countries. *Don v. Lippmann*.* *Lindo v. Belisario*.† *Warrender v. Warrender*.‡ Mr. Connelly is, therefore, before this Court in the same situation as any subject of this country, and he is to have no other law applied to his case. The next question is, what is the real bar set up in the Allegation in opposition to the Libel? As to the matrimonial law, Lord Stowell said, in *Sinclair v. Sinclair*,§ that a sentence of separation in a foreign Court would be entitled to credit and attention in these Courts; but that a judgment of a third country on the subject of a marriage not within its territories, nor between subjects of that country, would not be universally binding. Here an American subject is pleading a Roman sentence, which on the face of the plea is no sentence at all: it is only a private agreement between certain parties, and after this, it is admitted, the wife volunteered to return and live with her husband, so that she could not consider it as a sentence. Another objection is, that the sentence can be set aside at any time by the Pope. *Dict du Droit Canonique*.|| *Ligorio, Theol. Moral*.¶ If it be contended that this is a sentence, this Court is not bound to recognize a sentence pronounced in another country, which is contrary to public policy in this country. *Story, Conflict of Laws*.** *Vattel*.†† If any deference is to be paid to this sentence, it must be under the Roman Catholic Relief Acts, which merely authorize an acknowledgment of the existence of monastic institutions, but do

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* 5 Cl. & Fin. 13.

† 1 Hagg. C. R. 216.

‡ 2 Cl. & Fin. 532.

§ 1 Hagg. C. R. 297.

|| 4 Tom. p. 747; tit. "Vœux."

¶ T. iii. 6, I.

** C. xiv. § 340.

†† Lib. i. c. 19, § 213.

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not empower Courts of justice to take cognizance of their rules and private regulations superseding the law of this country. *Fulham v. McCarthy*.* In no text-writer is there any authority for the doctrine that a husband is barred from requiring his wife to return to cohabitation after she had taken religious vows; the inference is the other way. The passage referred to in the *Decretals*, "*De Conversione Conjugatorum*,"† will not bear out the proposition as stated.

Dr. Addams, for the wife.—This is a case *sui generis*, and I am not prepared to deny that it is a matter of discretion with the Court whether it will entertain such a suit or not. Mrs. Connelly comes here to protect herself against being compelled to cohabit with Mr. Connelly, after what has taken place between them,—a result which no one can contemplate without horror. I admit the truth of Sir John Nicholl's doctrine in *Barlee v. Barlee*, that, according to the practice of these Courts, only the adultery or cruelty of a husband can bar a wife from being sentenced to return to cohabitation with him. But in the case of *Molony v. Molony*, where neither cruelty nor adultery was pleaded, the Allegation was admitted, though the case went no further. That case shows, however, that an Allegation may be admissible, though not setting up cruelty or adultery. This Allegation is not a plea in bar; it is an appeal to the discretion of the Court. There is a *dictum* mentioned in *Viner's Abr.*,‡ that if a man marries a wife, and she before consummation enters religion, the marriage is not good cause of *dereignment*. This, however, is an entirely new case; such a case never occurred before, and probably will never happen again; so that the authorities cited on the other side do not apply.

Dr. Robertson, on the same side.

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SIR H. JENNER FUST.

(After stating the nature of the suit, the proceedings, the substance of the Libel, and the substance and effect of the Allegation.)

* 1 House of Lords Ca., N.S. 721.

† L. iii. c. 20, tit. 32.

‡ 17 Vol. p. 545, tit. "Profession," B.

The law, as applicable to the circumstances I have stated, is pleaded in the 21st article of the Allegation in these terms: "That the following are Rules of the Roman Catholic Church applicable to the question at issue between the parties in this cause, derived from, and regulated by, its written laws or Canons in that behalf, and of which the principal are to be found in the *Decretals*, l. iii. tit. 32, '*De Conversione Conjugatorum*,' to wit; first, that a husband and wife, *post matrimonium consummatum*, may lawfully separate by mutual consent, in order that they may enter into religion severally, to wit, by the husband taking Holy Orders, and the wife making a vow of perpetual chastity, and entering a religious house, or there being professed and taking the veil: second, that a separation founded on such mutual consent, and for such purpose as aforesaid, even after such Orders have been taken and such vow or profession made, though not annulling such *matrimonium consummatum*, debars the parties *in perpetuum ab omni usu ejusdem*, and from that time forth *alter alteram repetere non potest*: third, that a separation of husband and wife by mutual consent, for such views and objects as aforesaid, must be approved of and allowed by the Pope, upon the petition of the parties, and his Rescript of such approval and allowance, upon the religious profession of the husband and wife severally, or the ordination of the husband, and the vow or religious profession of the wife, as aforesaid, has all the force of a judicial sentence,"—so that this, which was originally pleaded to be tantamount to a separation, and secondly, to the effect of a sentence of separation, is here pleaded to have "all the force of" a judicial sentence: "such Rescript being deemed a conditional sentence from the time of its issue, but having its full force and vigour from the moment that the conditions mentioned or referred to in the Rescript have been fulfilled. And so much," it is pleaded, "was and is well known to the Judges and Advocates presiding or practising in Roman Catholic Ecclesiastical Courts, and others of reputation for their skill and knowledge of the law as there administered, and is also laid down by divers authors of eminence and authority on that subject."

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At present, I say nothing as to the mode of pleading the law as applicable to the case. It is certainly something out of the usual course of pleading; but considering this to be the law (at least for present purposes) by which the Roman Catholic subjects of Rome are governed;—admitting it to be so, as I am bound to do, for the present purpose,—the question remains to be considered, what is the effect of this law, as applicable to the circumstances of this particular case, namely, of a marriage between American subjects, being Protestants at the time of marriage, and afterwards abjuring that faith, and becoming members of the Roman Catholic Church, and the husband taking Orders in that Church?

Its effect.

Admitting the law to be as pleaded, the whole question is not determined thereby; because, in order to make this law binding in this country, it must be shown that it has been received in this country, and that this country is bound to respect that law of the Church of Rome. We all know that, in questions of marriage contracts, the *lex loci contractus* is that which is to determine the status of the parties; but we do not know, nor has it been shown, that the laws of a particular land, which are no part of the *lex scripta*, are to be necessarily taken notice of by other countries. These laws may be peculiar to the country in which they have been enacted; and other countries are not necessarily bound by those laws to free parties coming to reside in another country from obligations arising out of the contract,—the status which the parties have established by their marriage. It is not, therefore, sufficient to say that the law of Rome has done so and so; it must be shown that the law of Rome is, for this purpose, the law of this country. This is the manner in which the subject of marriage has been considered and distinguished in some respects from other contracts. In all cases which have come before these Courts, they have adopted the *lex loci contractus*, not simply because it was the *lex loci contractus*, but because, the contract having been entered into in a foreign country, the law of England adopts it as part of the law of this country. This was done in the cases of *Scrimshire v. Scrimshire*,* *Harford*

* 2 Hagg. C. R. 394. 11 12 111

vs. Morris,† *Ruding v. Smith*,† and *Dalrymple v. Dalrymple*.‡

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.. The first case, *Scrimshire v. Scrimshire*, which came before Sir Edward Simpson, in the Consistory Court of London, in 1752, was a suit for restitution of conjugal rights, founded upon a marriage in France, "clandestine and forbidden by the laws of both countries; with this difference, that, by the laws of France, such marriages are in all cases absolutely null, whereas, by the laws of England they are only irregular, but not null, unless under special circumstances." A sentence of the Parliament of Paris, declaring the marriage null, was pleaded, not as a bar to entertaining the question whether the marriage was good or not, but as evidence of the law of France, to assist the Court in determining whether the marriage was good by the law of England. Sir E. Simpson said: "The suit here is for restitution of conjugal rights, and a sentence in France is not of itself a bar to such suit; it is only evidence of what the French law is by which the Court is to try the validity of the marriage or contract. If there had been no sentence in France, the party might have shown that it was not a good marriage by the laws of France, and he might equally have denied the marriage; whether there had been proceedings and sentence or not at Paris, as I take it to be clear that both parties in the cause had obtained a *forum* in France, where the marriage contract was entered into, and, by marrying there, had subjected themselves to be punished by the laws of the country for a clandestine marriage; and had also subjected the validity of the contract to be tried by the laws of that country: as the contract itself, or the marriage, being according to the form of that country, was meant to be a marriage or not, according to the laws of that country, which is still more strongly shown in this case by inserting the words, 'If Holy Church shall it admit.' " Again: "As both parties, by celebrating the marriage in France, have subjected themselves to the law of that country relating to marriage; and as their mutual intention must be presumed

1 2 Hagg. C. R. 423.

† 2 Hagg. C. R. 371.

‡ 2 Hagg. C. R. 54.

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to be, that it should be a marriage or not, according to the laws of France, I apprehend it is not in the power of one of the parties, by leaving the place, to draw the question of the marriage or contract, *ad aliud examen*, to be tried by different laws than those of the place where the parties contracted. They may change the *forum*, but they must be tried by the laws of the country which they left. This doctrine of trying contracts, especially those of marriage, according to the laws of the country where they were made, is conformable to what is laid down in our books, and what is practised in all civilized countries, and what is agreeable to the Law of Nations, which is the law of every particular country, and taken notice of as such." Then he refers to Sanchez,* and other authorities. In another part he says: "Why may not this Court then take notice of foreign laws, there being nothing illegal in doing it? From the doctrine laid down in our books, the practice of nations, and the mischief and confusion that would arise to the subjects of every country from a contrary doctrine, I may infer that it is the consent of all nations, that it is the *Jus Gentium*, that the solemnities of the different nations with respect to marriages should be observed, and that contracts of this kind are to be determined by the laws of the country where they are made. If that principle is not to govern such cases, what is to be the rule where one party is domiciled and the other not? The *Jus Gentium* is the law of every country, and is obligatory on the subjects of every country. Every country takes notice of it; and this Court, observing that law, in determining upon this case, cannot be said to determine English rights by the laws of France, but by the law of England, of which the *Jus Gentium* is a part." And that is the effect of the observations made by Lord Stowell, in *Dalrymple v. Dalrymple*, where he says that this country has adopted the *lex loci contractus* as a part of its own law, and that we are to be governed by that law in determining questions of the *status* of parties contracting marriage in a foreign country. Therefore, the *Jus Gentium* is a part of

* De Matrim. l. iii. disp. 18, 10.

the law of England, and by that law is to be determined the question of *status* between these parties. Sir E. Simpson further says: "All nations allow marriage contracts; they are *Juris Gentium*, and the subjects of all nations are equally concerned in them; and from the infinite mischief and confusion that must necessarily arise to the subjects of all nations, with respect to legitimacy, succession, and other rights, if the respective laws of different countries were only to be observed, as to marriages contracted by the subjects of those countries abroad, all nations have consented, or must be presumed to consent, for the common benefit and advantage, that such marriages shall be good or not, according to the laws of the country where they are made. It is of equal consequence to all, that one rule in these cases should be observed by all countries,—that is, the law where the contract is made."

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So that, according to this authority,—followed by the other cases, *Harford v. Morris*, *Ruding v. Smith*, and *Dalrymple v. Dalrymple*,—in order to ascertain what the *status* of the parties is, you must have recourse to the law of the country where the contract is entered into; because the foundation of this rule is, that it is the *Jus Gentium*, which all countries consent to, or are presumed to consent to, until the contrary is shown, and the *Jus Gentium* being part of the law of the country where the marriage contract is to be decided, that country takes the *lex loci contractus* as the rule by which its decisions are to be governed. Result of authorities.

But this observation does not apply where it is not a part of the *Jus Gentium* that the rights, obligations, and duties which arise from that state are constituted by the *lex loci contractus*: that is open to the same considerations as those by which the law as to the *status* of the parties is to be determined. The law of Rome, unless it can be shown that it has been adopted in this country, or countries beyond its own territories, can have no effect there. Other countries may or may not adopt the law of Rome, as they think proper. It is no part of the law of this country that the law of Rome, as to its municipal regulations, should be of binding authority here, and therefore it is not entitled to have Questions of status, and of rights and duties.

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the effect, by the *lex loci contractus*, to determine the status of parties entering into a contract of marriage in a foreign country, where they were resident, and by the law of which country they entered into that contract. *15 Compt. 1*

The question, on this part of the subject, is stated by Mr. Berge, in his very useful work on *Colonial Law*. * Discussing the question of the status of parties, after citing cases and authorities, he sums up the whole in this way: "The *lex loci contractus* is and ought to be invoked solely for the purpose of ascertaining"—this goes to the two points, the *lex loci contractus*, as determining the status of parties, and as to the other rights, duties, and obligations proceeding from that status—"whether that which is represented to be a marriage is so in law; or, in other words, whether the relation or status of husband and wife has been legally constituted. When that purpose is answered, and it has been ascertained that, according to that law, a valid marriage has been contracted; as the connection of the parties with the country in which that law exists, and consequently their subjection to that law, ceases, so the law itself ceases to be the rule of authority which governs their conduct, or regulates their rights and obligations." The *lex loci contractus* determines the status, but not the rights and obligations proceeding from it. "The contract or consent, on which the status of husband and wife is founded, should be considered as perfectly distinct from the status itself. The latter is *Juris Gentium*,"—agreeing entirely with *Scrimshire v. Scrimshire*, and the other cases,—“and its relations extend so far beyond the parties themselves, that, unlike a contract, it is not in their power to prescribe for themselves the rights which it shall confer, or the obligations which it shall impose on them. It cannot, like an ordinary contract, be dissolved by their mutual consent. Although inevitable insanity, or any other impediment, should intervene, rendering the one party incompetent to perform his part of the contract, and therefore defeating the end and object of the marriage, still the status will subsist.” *15 Compt. 1*

* 1 Vol. 1, p. 100. 11. 12. 13. 14. 15. 16. 17. 18. 19. 20. 21. 22. 23. 24. 25. 26. 27. 28. 29. 30. 31. 32. 33. 34. 35. 36. 37. 38. 39. 40. 41. 42. 43. 44. 45. 46. 47. 48. 49. 50. 51. 52. 53. 54. 55. 56. 57. 58. 59. 60. 61. 62. 63. 64. 65. 66. 67. 68. 69. 70. 71. 72. 73. 74. 75. 76. 77. 78. 79. 80. 81. 82. 83. 84. 85. 86. 87. 88. 89. 90. 91. 92. 93. 94. 95. 96. 97. 98. 99. 100.

in this case, that the marriage contract is dissolved is not only suspended during the time the parties continue in the state in which they have placed themselves. Again, upon the question of the dissolution of the contract by the mutual consent of the parties, he cites Huber in "*Solenn. matrimonium partium concensus nullo modo, quicquam, et solius contraxerunt, non consensuales status prius conjugum solus redintegrari*." (Now, not a case to the other point.) The municipal law of every country takes upon itself to define and decide the rights, duties, and obligations which shall be incident to the status of marriage, whether that status has been originally constituted under its own law, or under that of any other country. It would be deprived of its legitimate power of persons, by importing the regulations prescribed by the law of some other country for their exclusive government, could withdraw themselves from those which the municipal law of the country in which they reside had prescribed for all its inhabitants. It is not, therefore, to the law by which the status is originally constituted, but to the law which, after it has been constituted, defines its rights, conditions, duties, and obligations, that resort must be had, in ascertaining what those conditions, rights, duties, and obligations are. It is not, therefore, to the law of Rome that we are to look for the conditions, rights, duties, and obligations, which arise from the status constituted by the law of Rome, or rather by the law of the United States of America; but we must look to the law of England for the conditions, rights, duties, and obligations contracted by the parties as husband and wife; and unless it can be shown that the law peculiar to other countries, or the law peculiar to Rome, or which has been adopted by other countries where the Roman Catholic religion prevails, unless it can be shown that this law has been imported into this country, and become part of the law of this country, we must look to the law of this country to ascertain what are the duties, and responsibilities, and liabilities, and consequences, which arise from the marriage state.

non est
—
solutio
(quod)

* *De Fam. et Matrim.*, l. ii. c. 1, s. 9.

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I have had no cases cited in which the law of Rome, as to this particular case, has been adopted here; nay, even in this country, when the Roman Catholic religion prevailed here, it is quite clear that the foreign professions were not regarded here at all. It was so stated in the Argument, and I was referred to Co. Litt., b. iii., c. 11, s. 200, where that high authority, speaking of persons forbidden to sue, who by law are incapacitated from suing, says: "The fifth is, where a man is entered and professed in religion: if such an one sue in an action, the tenant or defendant may shew that such an one is entered into religion, in such a place, into the Order of Saint Benet, and is there a monk professed, or into the Orders of Friars Minors or Preachers, and is there a brother professed, and so of other Orders of religion, &c., and ask judgment if he shall be answered. And the cause is this,—that when a man entereth into religion, and is professed, he is dead in the law, and his son or next cousin incontinent shall inherit him, as well as though he were dead indeed." Then, in the first Note, Lord Coke says: "It is to be observed that a man doth enter into religion at his first coming, and liveth under obedience; but he is not professed till a year be passed, or some time of probation; and he is said to be professed when he hath taken the habit of religion, and vowed three things,—obedience, wilful poverty, and perpetual chastity. And therefore our author saith here, entered and professed." Therefore, I take the law of Rome to be, that a person is professed when he has taken the habit of religion, and when he has taken the vows of obedience, poverty, and perpetual chastity, he is said to be "entered and professed." But in Note 32, it is said: "And if one joint tenant be professed in religion, the land shall survive to the other. If a man or woman be professed in religion in Normandy, or in any other foreign part, such a profession shall not disable them to bring any action in England, because it wanteth trial; but they must be professed in some house of religion within this realm, for that may be tried by the certificate of the Ordinary, so as of foreign professions the common law taketh no knowledge." So that whatever might be the practice at Rome at that time, this country took no notice of foreign professions.

In this case, then, what is the law of this country with respect to the rights, duties, and obligations arising out of the contract of marriage? One of them undoubtedly is, the cohabitation of the parties. This the law of England enforces as one of the necessary duties and obligations arising out of the marriage contract. It will not permit the parties voluntarily to separate themselves from each other; to dispense with that obligation which is part of the contract into which they entered. It cannot be by the mutual consent of the parties that this contract can in any manner whatever be released. In his book upon *Colonial Law*,* to which I have referred, Mr. Burge states the matter in this way, supporting his statement by authorities: "Neither divorce can be effected by the mere private agreement of the parties, but must be awarded by judicial sentence, after the party has been duly summoned, and satisfactory proof of the cause on which it is sought has been adduced." So that, according to the general law prevailing in the British possessions, separation cannot be effected by the mere private agreement of the parties; it must be by a judicial sentence. And this is in conformity with the doctrine held in *Evans v. Evans*,† and in other cases, and it is the every-day practice of these Courts, that married parties cannot voluntarily separate themselves, to live apart; and even though a deed of separation should be entered into by the mutual consent of the parties, each party may renege from the agreement, and may call upon the other party to perform the duties and obligations of the marriage contract between them. The Ecclesiastical Courts in this country pay no attention to deeds of separation, setting them aside, and pronouncing for the restitution of conjugal rights when sought by either party.

Then what is the distinction attempted to be made here? Why, that, by the law of the Church of Rome, these parties, under the circumstances stated in this Allegation, are entitled to live separate and apart from each other. They are not bound to do so; they may be bound by their vow,

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Connally.*

* 1 Vol. p. 640.

† 1 Hagg. C.R. 118.

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as members of the Church of Rome, to abstain from personal intercourse, but they are not bound to separate themselves from each other; and the parties seem to have lived together, for some time, between 1840 and 1843, in the same house; but still, as Mrs. Connolly pleads, observing the same perpetual chastity which had been agreed to be maintained between them; and after they were admitted to these Orders, there was, to a certain degree, a kind of cohabitation, which was broken off. But is this law binding here? I cannot find any authority, and I have been referred to none, by which this Court could be justified in stating that parties, coming to this country, and residing here, are not subject to the law of this country, so far as their own matrimonial relations are concerned. A party cannot come here and say, "the law of a country, of which I am not a native, nor in which I am a domiciled subject, shall set aside those obligations which, according to the law of England, are the necessary consequence of the marriage contract into which I entered." That is quite a different consideration from the other part of the case, which depends on the *lex loci contractus* not being a part of the *Jus Gentium*, a part of the law of the country. Therefore, until it is shown to me that the law of this country recognises this law of the Church of Rome, I am not at liberty to attend to those municipal regulations and those peculiar obligations which are only binding upon subjects of Rome, whether resident in its territories, or in those countries where the laws of Rome are respected, and treated as a part of the law of the country.

The alleged sentence of separation.

Something was said in the Argument upon the subject of a sentence of separation; and such a sentence pronounced by a competent Court is undoubtedly entitled to considerable attention. The law was alluded to by Sir E. Stimpson, in *Scrimsire v. Scrimsire*, but more particularly by Lord Stowell, in *Sinclair v. Sinclair*,* where he says: "Something has been said on the doctrine of law, regarding the respect due to foreign judgments; and undoubtedly

* 1 Hagg. C. 41 206.

a sentence of separation, in a proper Court, for adultery, would be entitled to credit and attention in this Court. But I think the conclusion is carried too far when it is said, that a sentence of nullity of marriage is necessarily and universally binding on other countries. The validity of marriage, however, must depend, in a great degree, on the local regulations of the country where it is celebrated. A sentence of nullity of marriage, therefore, in the country where it was solemnised, would carry with it great authority in this country; but I am not prepared to say, that a judgment of a third country, on the validity of a marriage not within its territories, nor had between subjects of that country, would be universally binding." That applies to a sentence dissolving a contract of marriage entered into by parties in a third country. But the passage I meant particularly to refer to is that which almost immediately follows: "The only instrument which is produced as a sentence does not contain a word respecting adultery; it speaks singly of nullity; and parol evidence cannot be admitted to explain and give a totally different effect to the instrument from what it purports itself to bear." So here, a sentence is pleaded as tantamount to a sentence of separation, and so considered at Rome. The sentence itself, therefore, must be looked at, to see what it does import in its own terms.

Now, to be sure, to call this a sentence of separation is to go beyond what, I think, the words of the instrument will warrant. It is simply a petition from Mr. Connelly, reciting the circumstances to which I have adverted [Reads the Petition]. So that, in point of fact, the whole subject of the petition is, under the circumstances therein stated, to obtain a dispensation from the necessity of having Letters Dimissory from the Bishop of Philadelphia, "which would occasion a very long delay, and might, perhaps, give rise to some embarrassment in so delicate an affair." The Answer to this Petition is as follows [Reads the Rescript]. Then follows the Vow of Chastity taken by Mrs. Connelly in June, 1845. That is not part of the sentence; that is part of the condition upon which the grant of dispensation is obtained from the necessity of having Letters Dimissory

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from the Bishop of Philadelphia. This vow is a vow of perpetual chastity on the part of Mrs. Connelly, which is said to be necessary before Mr. Connelly can be admitted to Holy Orders in the Church of Rome. This, in point of fact, is the whole effect of the sentence, as it is called, which is not a sentence of separation, and is not so pleaded, but as tantamount to, or in effect, a sentence of separation; that is, as I understand it, that by one party entering Holy Orders and the other taking a vow of perpetual chastity, they are, according to the law of the Church of Rome (as pleaded in the 21st article), entitled to live separate and apart from each other. But it does not enjoin them to separate, nor does it pronounce that they are entitled to live separate and apart from each other, in the way in which a sentence of separation is considered in these Courts.

No sentence.

Under these circumstances, therefore, this is no sentence of separation; it is not tantamount to, nor in effect, a sentence of separation. The consequence of being admitted to Holy Orders in the Church of Rome may or may not be a separation between married parties; but this is not the effect of the instrument, which cannot be extended, as Lord Stowell observed, in *Sinclair v. Sinclair*, beyond the terms in which it is drawn up. We must be governed by the instrument itself in order to know what its effect is, and not extend it beyond its terms by parol evidence. I am of opinion, on this part of the case, that there is no sentence of separation by a competent Court.

Then the question comes, whether the circumstances of the case are such as to entitle the parties to separate themselves from each other in this country, which is not subject to the laws of Rome, and does not hold the law of Rome to have effect in such cases; on the contrary, the rule of these Courts and of the Courts of Common Law being that the municipal laws of one country are not binding upon another except so far as that country may consent to receive them.

The profession.

The next question is, the profession in this country; and in order to make out that point, recourse has been had to the Statute for the relief of Her Majesty's Roman Catholic subjects, that is, the 10th Geo. 4, c. 7. The 28th section is

the Act which is applicable to the present case. The marginal note is, "For the suppression of Jesuits and other religious orders of the Church of Rome." So that it is not for the encouragement, but for the suppression, of Jesuits. It begins: "And whereas Jesuits, and members of other religious orders, communities, or societies of the Church of Rome, bound by monastic or religious vows, are resident within the United Kingdom; and it is expedient to make provision for the gradual suppression and final prohibition of the same therein; be it therefore enacted, that every Jesuit, and every member of any other religious order, community, or society of the Church of Rome, bound by monastic or religious vows, who at the time of the commencement of this Act shall be within the United Kingdom, shall, within six calendar months after the commencement of this Act, deliver to the Clerk of the Peace of the county or place where such person shall reside, or to his deputy, a notice or statement in the form and containing the particulars required to be set forth in the Schedule to this Act annexed." Then the 29th section enacts, "That if any Jesuit, or member of any such religious order, community, or society as aforesaid, shall, after the commencement of this Act, come into this realm, he shall be deemed, and taken to be, guilty of a misdemeanour, and being thereof lawfully convicted, shall be sentenced and ordered to be banished from the United Kingdom for the term of his natural life." The 30th section makes a provision with respect to natural-born subjects. Then the 31st gives permission to one of the principal secretaries of state to grant licenses to come into the kingdom, and to revoke the same. The 33rd section enacts, "That in case any Jesuit, or member of any such religious order, community, or society, as aforesaid, shall, after the commencement of this Act, within any part of the United Kingdom, admit any person to become a regular Ecclesiastical, or brother, or member of any such religious order, community, or society, or be aiding or consenting thereto, or shall administer, or cause to be administered, or be aiding or assisting in the administering or taking, any oath, vow, or engagement purporting or intended to bind the person taking the same to

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the rules, ordinances, or ceremonies of such religious order, community, or society, every person offending in the premises, in England or Ireland, shall be deemed guilty of a misdemeanour, and in Scotland shall be punished by fine and imprisonment." And the 34th enacts, "That in case any person shall, after the commencement of this Act, within any part of this United Kingdom, be admitted or become a Jesuit, or brother, or member of any other such religious order, community, or society, as aforesaid, such person shall be deemed and taken to be guilty of a misdemeanour, and being thereof lawfully convicted, shall be sentenced and ordered to be banished from the United Kingdom for the term of his natural life."

Therefore, it is perfectly clear that, so far as Mr. Connelly is concerned, he could not have entered into any such religious society after the commencement of this Act, passed in 1829; but he came to this country in the year 1846, and he there remains; he is not professed to be connected with any religious society in this country. There is, therefore, a general prohibition against entering into any religious community from the year 1829. But this does not apply to Mrs. Connelly, because she is exempted under the 37th section: "That nothing herein contained shall extend, or be construed to extend, in any manner to affect any religious order, community, or establishment, consisting of females bound by religious or monastic vows." Mrs. Connelly, perhaps, advised that, by the law of this country as it existed in Roman Catholic times, a foreign profession would not avail here, comes from Rome, to be resident here, furnished with the means of founding a religious community, of which she is to be the Superioress, and also supplied with rules and regulations, sanctioned by the competent authority, for the government of the community she was about to found; therefore, she does not incur any of these penalties. But it does not place her in any better situation than that in which she stood before the passing of the Act; whatever she was at liberty to do before the passing of the Act she is at liberty to do still. The 2 & 3 Will. 4, c. 45, was referred to, but it does not apply to the circumstances of the present case,

because Mr. Connelly is not a professed person in this country, so as to come within its provisions; and the former Act only places Mrs. Connelly in the situation she was in before the passing of that Act, and, entering into this community, where she has taken the oaths of poverty and obedience before the confessor of that community, she is not subject to any of the penalties imposed by that Act.

Then what does the case come to? It comes to this, Here is a person admitted to Holy Orders in the Church of Rome, who was at Rome for a temporary purpose, having no fixed domicile there, but so long as his residence in Rome continued, he was subject to the law of Rome; but I apprehend he did not bring this law with him from Rome to this country, and that the law of Rome would not operate here, except so far as the law of this country has consented to receive the law of Rome, and to adopt the conditions imposed on these persons, or the immunities granted to them, to live separate and apart so long as they resided at Rome; but how could they import that immunity to this country? Would it be an answer to an action for debt for necessities supplied to Mrs. Connelly, supposing it to occur,—for that is a point which must be considered,—would it be an answer to a person suing Mr. Connelly for debts contracted by his wife, that she was professed in religion, and was the head of a religious community in this country, and was therefore empowered by the law of Rome to live apart from her husband? Are there not other cases which might be supposed in which the husband is answerable for his wife? Take this case: suppose there should be a suit for adultery, would the husband be bound by this voluntary separation, by this profession of religion at Rome, to abstain from bringing a suit for separation by reason of adultery? God forbid that I should suppose it to be probable that it should occur under the peculiar circumstances of this case; but still such a thing may happen, and I put it as a case in which it would be impossible to say that the law of Rome would be so binding as to allow these parties (man and wife by the law of this country) to absolve themselves from those

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obligations and duties which they owe to each other as husband and wife.

Under these circumstances, therefore, I should be of opinion, if the Allegation were proved as pleaded, that it will not form a bar to the suit instituted by Mr. Connelly for the restitution of conjugal rights.

A good deal was said as to the motives by which Mr. Connelly might be supposed to have been actuated in bringing this suit. I have no means of judging of Mr. Connelly's motives, except from the facts that appear in the Allegation now before the Court. The motives may be good or bad. Mr. Connelly undoubtedly consented to the separation, — to that which is said to be tantamount to a sentence of separation between himself and his wife; but consent to the separation is no bar to a suit for the restitution of conjugal rights in this Court. I have already said that deeds of separation by joint consent are not noticed in these Courts, which pronounce a sentence for the restitution of conjugal rights, notwithstanding a deed of separation is set up. I cannot, therefore, listen to any argument derived from the motives which may be supposed to have influenced Mr. Connelly in his proceedings in this case. It may be for the purpose of protecting himself against demands on account of his wife; that, I apprehend, would be a legitimate ground for the proceedings: he is liable now to any debts she may contract. I cannot say such a motive would deter him from the remedy to which he would otherwise be entitled.

*Allegation
sets up no bar.*

Under these circumstances, I am, therefore, of opinion that, if the Allegation were admitted, and every fact were proved, it would be no bar to the sentence Mr. Connelly prays, namely, the restitution of conjugal rights, by Mrs. Connelly being required to return to cohabitation, to her husband's house. This Court does no more; it does not enforce any other obligation, and the sentence of this Court, therefore, would be, to reject the Allegation.

*Whether the
Court may hold
its hand.*

But it has been said that, although the Court may not consider this as a case in which the circumstances would operate as a bar to the suit, yet it may hold its hand, con-

siding the situation in which the lady is placed by the vows she has taken, and not compel her to a breach of those vows by enforcing the sentence. But however this circumstance may interest the feelings of the Court, it could form no basis to its judicial sentence. No case has been referred to in which the Court has held its hand in cases of this description; I do not mean a case of this peculiar kind, because it is the first I have heard of in these Courts. The only case I remember is that of *Molony v. Molony*,* which was a case certainly under very peculiar circumstances; it was a suit for restitution of conjugal rights, promoted by the husband against the wife. The marriage was pleaded in the usual form, the Libel was in the usual form, and the Allegation of the wife pleaded that the husband had no residence but one in Ireland, and such was her state of health, it was the opinion of her medical advisers that she could not return to live in Ireland without peril to her health, perhaps to her life. That Allegation was admitted by the Court with the greatest hesitation; but no further steps were taken in that cause. It might, perhaps, be considered to come in some degree within the description of cruelty if a husband should compel his wife to return to a country where her life might be placed in imminent danger from the nature of the climate. But be that as it may, it was with the greatest hesitation that the learned Judge then presiding over the Consistory Court admitted the Allegation; but nothing further was done; there was no holding the hand. There was another case where something of the kind was thrown out, under the peculiar circumstances, *Dennis v. Dennis*,† decided by Sir William Scott, which was considered to be incestuous adultery—the brother with the wife of a brother. In that case, the Court considered there was sufficient ground why it should not pronounce a sentence of separation, the husband being accessory to his own dishonour. The Court was pressed with the necessity of pronouncing a sentence notwithstanding, because the husband might be compelled to return to the wife who had

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* 10 Jur. 244, 249.

† Qu. 2 Not rep.

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been guilty of incest with the brother. But Lord Stowell said the Court might consider whether it would or would not decree a separation; but nothing was done with it, and there the matter rested, a sentence of separation not being pronounced between the husband and wife, because the Court was of opinion that the husband was accessory to his own dishonour.

These are the only two cases, I think, applicable to the suggestion that the Court might hold its hand. Is such a case as this, can the Court hold its hand? Has it any right to refuse Mr. Connelly the sentence which would require his wife to return to cohabitation? What the effect of the sentence may be, is a consideration into which the Court at the present moment will not enter; but, being of opinion that the circumstances here pleaded would not be a bar to the sentence prayed, *modo et forma*; being also of opinion that the Court would not be entitled to hold its hand, it is of opinion that the Allegation is not entitled to be admitted, and therefore rejects it altogether.

Allegation
rejected.

Proctors: Bayford, for the husband; Thomas, for the wife.

High Court of Admiralty.

Adm. Court Day.

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Bottomry.—THE "ORIENTAL" (HOYT).—*Cause, by Act on Petition.*—A British ship, the owner of which resided at New Brunswick, on leaving the harbour of New York for England, got upon the bar, and was forced to return to New York. The Act on Petition alleged that the vessel, belonging to Saint John's, New Brunswick, in February, 1840, having sailed from New York for Liverpool, with a cargo, on the 21st. February struck upon the bar of the harbour of New York, was eventually got off, in a very leaky condition,

and, on the 22nd, was towed back to New York, when it was discovered that she had sustained so much damage that it became necessary that she should be repaired and refitted, and she was accordingly put into dock, and, after survey, her cargo was landed; that the master, being totally unprovided with the requisite funds for defraying such repairs and the necessary charges, and being unable to raise the same on his own personal credit, or that of his owner, or otherwise, applied to Mr. George Miln, merchant, of New York, to assist him, and to advance the necessary sum on bottomry, who accordingly advanced the sum of 5,491 dollars, for which the master gave him the bond of bottomry in question, dated the 12th March, 1849, bearing interest at 18 per cent.; that the vessel, being repaired and refitted, and her cargo reshipped, on the 17th March, proceeded on her voyage to England, and arrived at Liverpool on the 20th April; and that the bond remained unpaid.

The Answer, on the part of the owners of the ship and cargo, alleged as follows:—

That the vessel was the property of Mr. Thomas Wallace, of Saint John's, New Brunswick; that Hoyt, the master, had commanded her for three years past, during which time he had made several voyages in her between New York and England, Messrs. Cannon, Miller, and Co., being the regularly appointed agents of the owner at Liverpool, and Mr. George Miln his regularly appointed agent at New York, and such agents transacted all the business at those ports connected with the *Oriental* and other vessels belonging to Mr. Wallace, and which were always consigned to them, as his agents; that by the general instructions given him by Mr. Wallace, the master was authorized to draw bills on Messrs. Cannon and Co. for the money required for the necessary disbursements of the ship at New York; that such instructions were well known to Mr. Miln, and that, on the arrest of the *Oriental* on her last preceding voyage from Hull to New York, Mr. Miln, as agent of Mr. Wallace, sold the cargo of coals, and having applied the proceeds in part payment of the disbursements, caused the master to draw a bill on Messrs. Cannon and Co., at Liverpool, for the balance of \$200; that when the *Oriental*, after sailing from New York on the 21st February, got back, Mr. Miln, as agent for Mr. Wallace, undertook to communicate to him her return; that, in the usual course

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repair; the master, being without funds to defray the charges, advertised for a loan on bottomry, and gave a bond for the amount required to a party at New York who had acted for several years as agent for the owner, though not regularly appointed, and who had refused to make advances on personal credit:—Held, that, although such party was clothed with the character of agent, he was not thereby, under the circumstances, prohibited from tendering and taking a bond.—It is not a proposition universally true, that an agent cannot, under any circumstances, take a bottomry-bond from the master of a vessel consigned to his charge, though it does not follow that, in all cases, he has the same right to take a bond as a person wholly un-

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connected with the ship.—An agent must not take advantage of his character of agent to take a bond which, by his discharge of his duty as agent, would have been avoided.

of post, a letter can be sent to Saint John's from New York, and an answer received, in twelve or fourteen days; and there is also a communication by electric telegraph between the two cities, whereby a message from New York can be transmitted to Saint John's in less than three hours; that such information from the said agent of the return of the vessel was telegraphed on the 23rd of February to Mr. Wallace, who immediately communicated with the master by a letter, dated Saint John's, the 23rd of February, acknowledging the receipt on that morning of such information; that (denying the averment in the Act, that the master was totally unprovided with funds, or means of raising money on personal credit, and therefore applied to and obtained an advance of money from Mr. Miln on bottomry) the master proceeded with the unloading of the vessel and with the repairs, himself superintending the same, in the full expectation that, as a matter of course, Mr. Miln, as agent of the ship, would, as usual, advance the funds required for such purposes upon a bill drawn by the master, as heretofore, on Messrs. Cannon and Co. of Liverpool, for the amount of such advances, or on Mr. Wallace, the owner, if Mr. Miln should so prefer; that no allusion whatever was made to a bottomry-bond, either by the master or Mr. Miln, until the 7th March; when, the repairs of the ship having been completed and the cargo reloaded, and the ship being ready for sea, Mr. Miln proposed that the master should execute a bottomry-bond for the expenses which had been incurred; that the master strongly objected thereto, but Mr. Miln informed him it was a common thing, and that he had written or would write to Mr. Wallace thereon; that Mr. Miln, in order to obtain the consent of the master to such bottomry-bond, informed him that his owner would have very little to pay, as the cargo was valuable, and promised to allow Mr. Wallace the difference of expense, as far as the ship and freight were concerned; that, as the ship was then intended to sail from New York on the 10th March, the master was induced, though with great reluctance, to consent to the proposal; that by reason of the statement of Mr. Miln, that he had written or would write to Mr. Wallace, the master made no communication on the subject to his owner; that, on the 10th March, Mr. Miln for the first time took steps to communicate to Mr. Wallace, his intention to take from the master a bottomry-bond, but, instead of making such communication by electric telegraph (which would have afforded Mr. Wallace sufficient time to reply thereto), Mr. Miln, on that day, sent a letter, addressed to Mr. Wallace, by post, which was received by him at Saint John's on the 15th, three days after the

execution of the bond; that in such letter Mr. Miln stated that he had deemed it prudent to take a bottomry-bond on the cargo for the expenses, and was willing to relinquish the proportion of premium that might fall to his share of the loss, and that, had the money been advanced for the account of Mr. Wallace, he should not have taken such bond; that of the sum secured by the bond, the amount actually paid by Mr. Miln was 3,920 dollars, the remainder being his charge for commission; that Mr. Wallace wrote a letter to Messrs. Cannon and Co., dated from Saint John's, the 31st March, informing them of the execution of the bond, and expressing his regret thereat, as he would have preferred himself paying the amount required; and the Answer lastly alleged that the ship and her freight for the voyage were together of the value of £6,000, which was well known to Mr. Miln.

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The Reply denied, *inter alia*, that Mr. Miln was the regularly appointed agent of the owner, though it admitted that the master of the *Oriental* had occasionally consigned that vessel to him, the master, however, being always at liberty to change such consignment, and the consignment of the vessel in the present case came direct from the master, and unknown to Mr. Wallace; it admitted that Miln did communicate by electric telegraph to Wallace the disaster which befel the *Oriental*, but alleged that in reply he received no instructions whatever from him, nor did the master inform him that he had received any; it alleged that the whole business of unloading, repairing, and reloading the ship, was done by the master, and that all debts in respect thereto were contracted by him on his own responsibility, Miln incurring no liability; that Miln being already in advance to the owner, and his draft on another transaction having been dishonoured, he, on being applied to by the master, on the 8th March, to advance money to discharge the expenses and disbursements, declined to do so on the credit of the owner; that, after such refusal, the master inserted advertisements in the public journals for a loan on bottomry; that Wallace, though informed of the condition of his vessel, never, throughout the whole transaction, communicated any instructions whatsoever to Miln, or in any way proposed himself to advance the necessary money; that the electric telegraph was equally available to the master as to

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Miln, and that the master might and ought to have communicated with his owner, who, when advised of the bottomry-bond, never took any objection thereto.

Sir J. Dodson, Q.A., for the bondholder.—It is alleged that Mr. Miln was the regularly appointed agent of Mr. Wallace at New York; but the utmost the proof amounts to is, that it was usual to consign the vessel to him, and that he had acted as agent on several occasions; there was no regular appointment of him as agent by Mr. Wallace, and he was always subject to the direction of the master. Even if he acted as agent on this occasion, he was not bound to repair the ship on her return, or to advance his own money. A loan was advertised for, and he offered at the lowest rate. *The "Hero."** *The "Augusta."*† *The "Tartar."*‡

Dr. Bayford, on the same side.

Dr. Robinson, for the owners of the ship and cargo.—The validity of all bottomry transactions depends upon this fundamental principle, that the ship was, at the time of the advance, in a state of unprovided necessity; whereas, in this case, there was a resource in the personal credit of the owner, in which case, the master's authority to hypothecate the ship ceases. There is another principle: a person who once clothes himself with the character of agent is not entitled to deal with the concerns of the ship as an ordinary merchant. I do not contend that, as agent, Mr. Miln was bound, under all circumstances, to make advances for the ship, or could not repudiate his agency, and take upon himself the character of a third party; but when a person, having clothed himself with the character of agent, and mixed himself up with the concerns of the ship, means to throw off that character, and to lend money on bottomry, he is bound to give notice to the owner or master of the ship, and the owner in this case was within telegraph distance from New York. In the "*Hero*," Lord Stowell qualifies his doctrine that an agent may be a bondholder thus: "Cases may possibly arise in which an agent may be jus-

* 2 Dods. 139.

† 1 Dods. 283.

‡ 1 Hagg. A.R. 1.

tified in bondings. If in such a case he gives fair notice that he will not make any further advances as agent, and affords the master an opportunity of trying to get money elsewhere, and he is unable to do so, but is obliged to come back to him, for a supply, then he is fairly at liberty, like any other merchant, to advance the money on a security more satisfactory to himself.

Dr. Twiss, on the same side.—The strong point in this case is, the facility of communication between New York and New Brunswick.

DR. LUSHINGTON.

On the 12th March, 1849, a bottomry-bond was executed by the master of this ship, for the sum of £1,893. 10s. 7d., purporting to bind the ship, cargo, and freight. It was given at New York, and, alleged, under the circumstances set forth in the bond. It appears then from the bond (assuming the statement to be true), that this was a vessel of 700 tons burthen, belonging to the port of St. John's, New Brunswick; that, in the month of February preceding, she had left New York, bound for Liverpool; that she struck upon a bank near the outer harbour of that city (New York), and was of necessity brought back to that port; that, in consequence of this accident, very large expenses were incurred for repairs and other matters; that the master, having no credit himself, nor on account of his owners, applied to Mr. Miln, a merchant of that city, to advance the necessary funds, which he accordingly did, on bottomry, at fifteen per cent. The vessel arrived in this country on the 20th April, and, the money not being paid, an action was commenced on the 25th April, on behalf of the holders of the bottomry-bond. It is not denied that the bond was executed by the master, nor are the principal facts recited in the bond alleged to be untrue. Its validity, however, is impugned, and on grounds which I must now proceed to examine.

In the Answer to the Act, the following averments are made:—that the ship was the property of Thomas Wallace, of St. John's; that Hoyt, the master, had commanded her

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for three years, during which time she had made several voyages between New York and Liverpool and Hull; that George Miln (to whom the bond was granted) was the agent of the owner at New York, and Cannon, Miller, and Co. his agents at Liverpool; that the master was authorized to draw bills on Cannon and Co. for the necessary disbursements of the ship, and that this was well known to Mr. Miln. In proof of this averment, it is alleged that Mr. Miln had, on a previous voyage of the ship to New York, sold the cargo, when the vessel was arrested, and caused the master to draw a bill on Cannon and Co. for the balance of the disbursements, which was paid. The Answer further states that the master proceeded with the unloading of the ship at New York, and with the repairs, expecting that Mr. Miln would, "as usual,"—for that is the way it is stated in the Answer,—advance the funds; that no allusion was made to a bottomry-bond until the 7th March, when the ship was ready for sea, and then Mr. Miln induced the master to execute it by divers representations: and then follows a reference to the correspondence which is annexed.

The substance of this defence is, that Mr. Miln was the regular agent of the owner, and therefore, and because the master's bills for expenses would have been honoured, a bond taken by him would be invalid.

Legal effects
 resulting from
 agency.

It is necessary, in the first instance, to consider what the law is with regard to an agent of an owner making advances, and taking a bottomry-bond. That an agent cannot, under any circumstances, take a bottomry-bond, is a proposition which, I think, cannot be maintained as universally true. There can be no obligation upon a merchant, merely because he takes upon himself the office of agent, to advance to any required extent his own funds for the repairs and outfit of a vessel consigned to his charge. This advance of money is no part of the contract into which he necessarily enters when he becomes an agent; the prudence of so doing must depend upon many circumstances, of which he has a right to judge. To this extent I am fortified by the judgment of Lord Stowell in the case of *the "Hero,"** cited

* 2 Dods. 139.

by the Queen's Advocate in the course of the Argument. And, independently of that high authority, I think, upon all principles of just reasoning, there can be no such general obligation to advance. But, though an agent is not bound to make advances, unless he deems it prudent to do so, it does not follow, as a necessary corollary, that he has a right to take a bottomry-bond; neither does it follow that in all cases he would have the same right to take a bond as a person wholly unconnected with the ship. I think that the legal line of demarcation lies between the two extremes. To use Lord Stowell's own words, "cases may possibly arise in which an agent may be justified in taking a bottomry-bond." The true question is, whether the facts attending the taking of this bond constitute such a case. It is clear, it must be in cases in which the agent does not take advantage of his character of agent to take a bond which, by his own discharge of his duty, would have been avoided.

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Having made these remarks upon the legal effects resulting from agency, I now come to consider the fact of agency. I should observe that, besides all the facts to which I have referred, stated in the Act on Petition and Answer, there are many very material averments to be found in the Reply, on behalf of the bondholder, all which have not been contradicted by further pleading on behalf of the opponents of the bond.

Upon considering the evidence with respect to the question of agency, the facts appear to be, that Mr. Miln had acted as agent for Mr. Wallace on several occasions during the last five years; but I do not find that there was any regular appointment of him as agent; and I must say that I do not consider this a matter of any great importance, for if Mr. Miln had been the regularly appointed agent, such a circumstance, standing alone, would not make it a part of his duty to advance funds on the personal credit of Mr. Wallace, nor wholly, as a matter of necessity, incapacitate him from taking a bottomry-bond. Mr. Miln states that he did not consider himself to have any appointment of agent to Mr. Wallace; that he believed the master of the vessel

Evidence as
to agency.

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had authority to consign the ship to him, or take it out of his hands, and that his employment, whatever might have been its nature, ceased when the ship first sailed, and before she got aground. Here, again, I do not think it would answer any good purpose to attempt to do, what indeed would be very difficult, to ascertain how far Mr. Miln was right in those opinions; because, coupling the fact with the part he took upon the return of the ship to New York, I cannot but conclude that he was acting as agent, so far at least as justly to induce Mr. Wallace so to consider him, as the correspondence clearly proves he did. The letter I now refer to is that of Mr. Miln to Mr. Wallace, dated "New York, the 26th February, 1849 :"—

Dear Sir,—I sent you a few lines on the 23rd inst. per telegraph, advising you of the unfortunate occurrence which happened to the *Oriental*, on her getting out to sea, and just at the moment when the pilot was preparing to leave her. She is now in the Atlantic Dock, and the surveyors having ordered her to be discharged, we commenced unloading on Saturday morning, and will have all the cargo out to-night, and will have her on the ways on the following day, when another survey will be held on the vessel, and I will then report to you what injury she has sustained, and although she lay all night on the Sand Bar, the weather being moderate induces me to think that she is not seriously injured, as the leak has decreased since we began to lighten her. The expenses will be considerable, but fortunately the cargo is valuable, and being on general average, it will not fall so severely as it otherwise might have been the case. It, however, vexes and annoys me very much that such a misfortune should have occurred immediately on the back of the *Kate Kearney*, and Captain Hoyt also feels it as well as myself. I shall use all exertion to have her ready for sea again, and if the repairs do not detain us, she may be loaded again by the end of this week. Our Insurance Companies are getting quite sick of British ships, and it is now very difficult to get them insured on any terms, the losses this season have been so heavy; but in the case of the *Oriental*, no blame is attached to any one but the pilot, and it was certainly a great piece of carelessness on his part.

The lender an
agent.

It is impossible to read this letter without being satisfied that it is a letter written in the character of agent: the

whole tenor of the letter, certainly, to my satisfaction, fixes on Mr. Miln (whatever be the result) the character of agent. I think I am, therefore, bound to say that Mr. Miln was, *quid* this ship, clothed with the character of agent, and charged with all the responsibilities, obligations, and disabilities attendant upon that character.

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Assuming this to be so, the main question, as it appears to me, is this, whether Mr. Wallace had supplied funds or credit to satisfy the demands of this exigency, and that Mr. Miln was aware of this? Throughout all these proceedings I do not find it directly averred, and certainly not, as I believe, proved by evidence, that Mr. Wallace had ever given express directions and authority to Mr. Miln to draw upon Messrs. Cannon and Co., or upon Mr. Wallace himself, for the necessary expenses of so large an outlay as took place upon the present occasion. I may go further; I find no general authority for Mr. Miln to draw at all, either upon this or any other occasion. But, supposing there had been a general authority to draw, still it must have been competent to Mr. Miln to exercise his own discretion, whether he would advance his own funds upon the personal credit of Mr. Wallace. If the fact were, that Mr. Miln had such authority, what would be the legal obligation arising from such a state of things? I think the utmost extent to which such legal obligation could be carried would be, that, if practicable, he ought to have given notice to Mr. Wallace that he would not advance the money on such security. I say "if practicable," for it would be absurd to suppose that, in all cases, such notice ought to be or could be given. Take an agent in China, with a valuable ship and cargo consigned to his care; if an accident happens to the ship, how is he to give notice to the owners in Europe? What is the party to do under such circumstances? It may be said that such agent, although he cannot give notice, is barred from advancing money on bottomry. Is that proposition true? Would it be for the interest of owners in general that it should be established? I very greatly doubt it. I think the effect would be to throw into the hands of strangers transactions which would be better and more

Whether the
owner had sup-
plied funds.

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cheaply done by those whom the owners had trusted, and who had an interest in keeping up the connection. Moreover, it would be clearly detrimental in one respect, namely, the narrowing the market, by excluding one probably most willing to undertake the business, and, to a certain extent, naturally bound to consult the interests of the owners, even for his own sake.

But I am very reluctant to have it supposed that I would uphold an agent, having authority to draw bills, and having given to his principal reason to believe that he would advance on personal security, in taking a bottomry-bond, without notice, where such notice could be given so as to enable the principal to avert the bottomry if he were so disposed. In the present instance, I am of opinion that the agent had no such general authority given to him individually. It has, however, been said and sworn, that the master had authority to draw bills, and that he would have done so. Supposing this to be true, I have not sufficient evidence to satisfy my mind that Mr. Miln knew of such authority; and, even if he had such knowledge, he was not bound to have taken such bills in payment.

Notice to the owner.

The case, as it appears to me, resolves itself into this: did Mr. Miln, being clothed with the character of agent (as I think he was), give the notice which could be reasonably required? Had the owner or the master the means of obtaining funds on personal credit at New York? If the law required that Mr. Miln, as agent, should give specific notice that he would not advance on personal credit, but would require a bottomry-bond, assuredly no such notice was given. If Mr. Miln had general authority to draw, and if he had been in the habit of so drawing, then I think he might reasonably have been required to give such notice, and for many sound reasons; because, under such circumstances, the owner would have had just grounds to rest satisfied that the money would be advanced on personal credit. But the evidence does not establish such a state of facts. It may be well to consider, what was the notice given, and what the conduct of the parties.

Conduct of the owner.

The ship returns to New York on the 22nd February; on

that day Mr. Miln acquaints the owner of the ship, by telegraph, of the fact. Mr. Miln says he considers he was only acting a friendly part. On the contrary, I consider he was acting as agent, and acting most properly, in making this early communication to Mr. Wallace. What does the owner do, having received information that his ship had been aground and had gone back to New York? In what way does he act to protect his property? What answer does he send, or what instructions does he give? Does he write to Mr. Miln as his agent, and say, "You will superintend the repairs, take care the outlay is not excessive, and, according to my previous authority, draw bills for the amount, or make the master do so, and I rely upon you for advancing the funds?" Surely, it was the duty of Mr. Wallace, for the sake of his own interest, having received this information respecting the condition of his ship, to answer it by another communication by the telegraph. He might have said, "I trust you will do the best you can for the ship; either advance funds, or draw yourself, or take the master's drafts." I think, whatever might have been the previous state of things, some such communication might have been made by Mr. Wallace, and must reasonably have been expected by Mr. Miln. Mr. Wallace does write two letters, and on the 23rd February, one addressed to Mr. Miln, and the other to the master. In neither of these letters are there to be found any instructions whatever as to the manner in which the disbursements should be paid for. Look at the letter, dated 23rd February, to Hoyt, the master :—

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Dear Sir,—Your favour of the 15th inst. came to hand last evening, and I received advices this morning, by telegraph, from Mr. Miln, of the *Oriental* having been on shore and back leaky, and discharging cargo. I trust the injury is very slight, as the vessel is very strong in the bottom and all parts; it is more than likely that she is strained, and that she will only require caulking. However, she must be repaired, and most likely proceed on her voyage with all possible despatch. If the cargo should be much damaged and sold, it might do to put a coat of stuff on her bottom, to prevent the worms from doing injury, and charter her to load at

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Apulichicola, if 9/16 p. cwt. could be obtained. I only make this suggestion, but do not think it is likely to take place. There should be good freights at Savannah and New Orleans yet this season. I notice that you wish me to pay Mr. Raymond £150 on your account. It will be rather inconvenient for me to pay it for two or three months; but if he requires it, I shall have to arrange it with him in some way.

In this letter, written by Mr. Wallace on the 23rd February, after having received intelligence of the accident which had happened to his ship, though he comments upon the accident, and as to what is to be done, he says not one word as to providing for the repairs, or for the expenses necessarily incurred, nor does he refer to any arrangement previously made, or to any mode of providing funds. I really must say that it was the duty of Mr. Wallace, for the protection of his own interest, to have written in rather a more business-like way. In this very letter he speaks of the inconvenience of having to pay £150. I think, unless some further explanation were offered, it would have been surprising if Hoyt, the master, had drawn for £1,350, or half that sum, after the receipt of that letter.

I will now turn to Hoyt's affidavit. In it he speaks of the £200 draft he had drawn for the cargo of coals, and which had been taken by Mr. Miln in part payment of the disbursements of a former voyage; and this circumstance has been much commented upon, as tending to prove that Mr. Miln ought to have accepted his drafts on the present occasion. But, independently of Mr. Miln's explanation, that this was an unexpected transaction, I think it does not follow that, because an agent will run the risk of £200, he would therefore advance, without security, £1,350. The master swears in this way: that is, "had no particular instructions, but general orders to draw upon Cannon and Co. if he wanted money." This being so, according to his own statement, I do not find in his affidavit that he ever proposed to Mr. Miln, or to any one else, to take his drafts on Mr. Wallace, or on Cannon and Co. It is strange, if the master was so reluctant to give a bond, and had a power to draw upon Messrs. Cannon and Co., at Liverpool, as well

as upon Mr. Wallace himself, that, throughout the whole transaction, there is no evidence of any one attempt to use this credit in any way whatever. Again, there is no evidence that anybody would have taken those drafts; there is not an atom of evidence to show that anybody in New York would have taken drafts upon Cannon and Co., or upon Mr. Wallace himself. It is of no use to talk of a power to draw, unless you can prove that some person was willing to give the money.

It is clear from the examination of all the evidence, that Mr. Miln, though he gave Mr. Wallace early and ample notice of the disaster which had befallen his ship, and that large expenses would be incurred, did not inform him either that he would advance the necessary moneys, or that he would require a bottomry-bond. He did neither. I think it is reasonable to infer that he expected advices from Mr. Wallace, and I am at a loss to conceive why it is that, from the 23rd February up to a late period of the transaction, Mr. Wallace never writes at all upon the subject of the advance of funds. There is no evidence to show that Mr. Miln held out to the master, or any one else, that he would in any way be responsible for those expenses, or that he would make any advances. Mr. Miln swears that he never did make himself responsible, and in this he is wholly uncontradicted.

What was the real course of the transaction, according to the evidence? I think it appears to have been this: the unloading, repairing, and relading the cargo was proceeded with, as a matter necessary to be done without delay, under the orders of the master, with the superintendence of Mr. Miln. Nothing was said by any one as to payment or advance of money. Mr. Wallace probably expected that Mr. Miln would advance the funds; Mr. Miln as probably thought that Mr. Wallace would give directions. In this state of uncertainty matters went on until the ship was repaired and ready for sea, and the exigency, as to the providing of funds, then arose. I think it appears from Mr. Miln's letter, dated 7th March, annexed to Mr. Miller's affidavit, that he was then in doubt whether he should

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require a bottomry-bond or advance on Hoyt's drafts ; because, in the postscript he says : " As the expenses here of landing and reshipping the cargo will be considerable, and having no funds of the owner's in hand, I think it will be prudent for all parties to take a bottomry on ship and cargo for my advances, and I will therefore thank you to insure Dra. 3,000 on said bottomry, to protect those interested. The ship is now in fine order, and her cargo, as also the vessel, has been insured here on as low terms as any British ship out of port. Capt. Hoyt is also a favourite with our underwriters, and I could have done it here ; but in case I should take Capt. Hoyt's drafts on you for the amount, I thought it as well to have the insurance done on your side, for your own security." If I understand this postscript rightly, it is this: Mr. Miln was in doubt whether, under all the circumstances, he should or should not advance money on personal security,—whether he should take Capt. Hoyt's drafts on Cannon and Co.,—but in the event of his so doing, he wishes to have the insurance made to protect them, as well as himself. It appears that, ultimately, he determined not to advance on personal security, as most unquestionably he was justified in refusing to do. Although Mr. Miln might have had such an idea in his own mind, that he would advance on personal security, there is no evidence that he expressed such intention to the master, or to any one else. And upon this point the affidavit of Mr. Lawson is a very important one to enable the Court to see the real course of the transaction. He says that his house of business as average brokers were, on the return of the ship to New York, applied to by Capt. Hoyt for aid and advice, which they gave ; that he informed them that he was not able to raise the necessary funds, and consulted Mr. Lawson as to the best means of so doing, informing him that his owner was not able, or had not provided them ; that Mr. Miln, who had been the agent of the ship on other occasions, had positively declined to make the advances ; that he advised the master to advertise for the amount on bottomry, and the deponent's house, having the master's authority, on the 9th and 10th March, advertised

..

for a loan on bottomry; that three answers were received, one at a premium of 20 per cent.; another at 22 per cent., and one from Mr. Miln at 18 per cent., and the deponent advised the master that it was his duty to take the money from Mr. Miln, as he had made the most favourable offer; that Mr. Miln, in the deponent's presence, and in the presence of Capt. Hoyt, refused to make the advances necessary to pay the disbursements of the ship on the simple security of the owner, who, he believes, from frequent conversations he (deponent) had with the master on the subject, had left the whole management of the matter in the master's hands, to do the best in his power to raise the necessary funds, he (Mr. Wallace) not being disposed or able to make the advances himself, but rested in the vain hope that Mr. Miln or some other house would trust him the large amount required.

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Now, to be sure, if this evidence is to be believed, as I think it is, it is a very satisfactory statement, and shows that it was not in the master's power to raise the necessary funds otherwise than by the execution of a bottomry-bond; and then the single question for the Court to determine is, whether it was competent to Mr. Miln, under the circumstances, to take it.

Result of the
evidence.

The real question then is this: was Mr. Miln prohibited by law, by being agent, from tendering, as another merchant might do, and taking a bond? In my opinion he was not prohibited. I think, indeed, had all the expenses belonged to Mr. Wallace, he would have been willing to advance the money on his personal security; but he did not think there was any reason he should do so on account of the underwriters of the cargo. He manifestly wished well to Mr. Wallace, for he was willing to forego the bottomry premium so far as it would fall on the ship, but he was in no degree inclined to incur risk on account of others.

The points in
question.

The only remaining question is, whether, under the circumstances, it being competent to Mr. Miln to take a bottomry-bond, it is void because he did not give Mr. Wallace notice by telegraph? If there had been no previous communication at all from Mr. Miln to Mr. Wallace, and Mr.

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Miln had gone on to act as agent, the case would have stood in a very different position, and still more so if there had been the slightest proof of any intentional concealment on the part of Mr. Miln. The omitting to give such notice, coupled with other circumstances, might, I think, have given to this case an unfavourable complexion. But when I look at the correspondence, I see no proof of any attempt at concealment, and I cannot hold that Mr. Miln was bound to have availed himself of that channel of communication, the electric telegraph, and that the omitting to do so vitiates the bond.

The bond
valid.

I must, therefore, pronounce that this is a valid bond. Whether the charges included in it are correct or not, is, of course, matter of reference to the Registrar and Merchants.

Proctors: *Gosling*, for the bondholder; *Tebbs*, for the owner.

Necessaries.
— Demands
against a for-
eign ship,
under the Sta-
tute, for money
advanced to the
master and sup-
plies for the use
of the ship, by
a person alleg-
ing himself to
be the agent,
appointed by
the master, —
pronounced
against as ficti-
tious and frau-
dulent.

THE "HELENA SOPHIA" (FORSHALL).—*Cause, by Act on Petition.*—This was an action for necessities, by Louis von Carnevalli, of Great Grimsby, shipbroker and shipping agent, against the Russian vessel *Helena Sophia*. The Act on Petition alleged, that the vessel, having, in her voyage from Odessa to Leith, met with tempestuous weather off the English coast, was, on the 22nd March, 1849, assisted into the port of Grimsby, where the master, being apprehensive that the vessel would be arrested for salvage services, and being without funds, applied to Mr. Carnevalli to advance the necessary sums, and that Carnevalli accordingly paid £30 to some fishermen who had assisted the vessel into Grimsby; £25 for the use of a steamer, which had towed her thither; £55 for the use of lighters and for labour, in discharging the cargo; and also advanced to the master, at divers times, sums amounting to £212, for wages and the maintenance of his crew, and for light and buoyage dues; the whole amount being £322, which was advanced on the credit of the ship alone.

The Answer of the owners (in Finland) alleged that, on the 23rd March, the day of the vessel's arrival at Grimsby,

the master, Forshall (who was superseded in the command of the vessel by the owners, on the 13th April following), appointed Messrs. Hans Marcher and Co., of Hull, agents for the ship, in which capacity they had since acted, especially in making the requisite payments and advances on account of the ship; in particular having paid £30 to certain fishermen for assisting her into Grimsby; that £5 (not £25) for the use of the steamer, and £8 (not £55) for lighters and labour, had been in fact paid by Mr. Carnevalli, and such sums, with about £15 or £18 on account of light dues, were paid by him since the institution of the suit (14th May), and without authority or directions from the master; that Carnevalli well knew, from the time of their appointment, that Marcher and Co. were the duly appointed agents of the ship, and were ready to act in that capacity, and moreover, when they, on the 23rd March, informed him that they, as such agents, would repay him any advances he had made on account of the ship, he replied that he had made no such advances, and had no claims on the ship.

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The Reply of Mr. Carnevalli alleged that, on the 22nd March, the master, Forshall, in writing, appointed him (Carnevalli) to act as agent of the ship, at the same time delivering to him (as customary with masters of foreign vessels) the log-book and other papers; that the master did not appoint Marcher and Co. to act as his agents, or authorize them in any manner to interfere in the affairs of the ship, nor did Carnevalli ever recognize them as the agents of the ship, or admit to them that he had made no advances to the ship and had no claim on her owners; that, at the request of the master, he engaged a steamer to go out to the vessel, and tow her from the Spurn Light into Grimsby, for which he paid, on the 23rd March £5. 5s. (and not £25, as erroneously alleged by him in the Act); that on the 26th April he paid £17. 2s. 10d. for light-dues and buoyage; that he paid the £30 to the fishermen on the 23rd March; that he engaged lighters to take out part of the cargo, the bill for the use of which, amounting to £8. 5s., was delivered to him on the 28th March, though not paid until the 19th May; that £47 was paid by him to the labourers

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employed in taking out the cargo during the progress of the work; that he advanced to the master, on the 23rd March, £100; on the 14th April, £20; on the 1st May, £10, and on the 5th May, £51. 5s., and that he expended in travelling expenses to Hull and London, on matters connected with the ship, £13; making together £194. 5s.; and, with reference to the averment of the master's supersession, it alleged that, on the 21st December, 1848, Forshall, being at Falmouth, where he had called for orders, received a letter from the managing owner of the vessel, dated 30th November, directing him to charter his vessel for the Mediterranean and thence home; and he accordingly, on the 10th April, signed a Charter-party, whereby he agreed with Mr. Carnevalli that the ship should proceed with coals to Malta, thence to Genoa, where he was to take in marble and silk for St. Petersburg, with a penalty of £700 for non-fulfilment of the agreement, which, it alleged, was binding on the owners, who, by reason thereof, had no power to supersede Forshall in command of the ship (save with the consent of Carnevalli) until after the fulfilment of the Charter-party; that, on the 14th April, Forshall received information from the Russian Consul that he had been superseded, and on the 28th April, a copy of a letter from the owners was forwarded to him by the Consul, but as he had not received any other instructions from his owners, who were not aware that he had, as directed by them, executed the Charter-party, he continued to act as the master; and as the owners, through their agents, had refused to carry out the Charter-party, he (Carnevalli) held the log-book and ship's papers, as security.

The Rejoinder alleged that, on the 23rd (22nd) March, Forshall, the master, signed the usual pilot's certificate, and therein desired Marcher and Co. (whom he had previously appointed his agents) to pay the pilotage dues; that two of the clerks of Marcher and Co. went to Grimsby, accompanied by Forshall, to report the vessel, when he signed at the Custom House there the usual Declaration, in which he described Marcher and Co. as his agents, on which day, such appointment was made known to and recognized by

Carnevali, and a few days after, the master, accompanied by one of the said clerks of Marcher and Co., delivered to the Russian Consul the register and ship's papers, the log-book being unduly and collusively delivered up by the master to Carnevali; that the buoyage dues (14s. 4d.) were paid, on behalf of Marcher and Co., on the 20th April, and the men employed in lightening the vessel were paid on the 24th March, by or on behalf of Marcher and Co., from whom the master had received, on his application, at various times, on and between the 24th March and the 23rd April, advances for the use of the ship amounting to £45, made by Marcher and Co., in the character of agents; that, between the arrival of the ship at Grimsby and the discharge of the master, the crew received from him £4. 6s. only; that, on the 27th January, 1849, the managing owner of the ship sent a letter to the master (the letter referred to in the Reply), which recalled the orders of the 30th November, and directed him to proceed home in ballast, and that such letter was received by Forshall long prior to the 10th April; that the Charter-party is not binding in law on the owners, who were not precluded from superseding the master, and that he, on the 22nd March, was informed in the office of Marcher and Co., that his owners had sent Capt. Ravander to supersede him; that, on the 25th March, Ravander informed Forshall of his having been superseded, and exhibited the power of attorney and instructions of the owners to that effect, whereupon Forshall removed his clothes from the ship and took up his residence in Hull; that on the 21st April, he wrote to Capt. Ravander, formally delivering up the command of the vessel from that date.

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A Sur-Rejoinder and a Rebutter contained sundry denials and explanations, but no additional facts.

Dr. Jenner, for the party suing, contended that the sup- Jan. 18.
plies and advances actually made to the ship, under the ARGUMENT.
authority of the master, were recoverable under the Statute; citing the "*Lusitano*."*

* 1 Rob. jun. 166.

MARCH 25. *Dr. Addams and Dr. Twiss*, for the owners, resisted the suit on the ground that it was a case of flagrant collusion and fraud between the pretended agent and the displaced master of the ship.
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DR. LUSHINGTON.

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This is a foreign ship, which was forced by tempestuous weather to take refuge in the port of Grimsby, and the action is brought by Mr. Louis von Carnevalli, a shipping agent, resident at Grimsby, for moneys supplied, and disbursements alleged to have been made, for the necessary use of the vessel. It is incumbent on the plaintiff in such an action, which is authorised by a recent Act of Parliament,* to prove the disbursements and advances, and the necessity for them. The Act on Petition sets forth several sums said to have been paid, and, in addition to those items, advances to the master, amounting in the whole to £212. The Defence states that the ship arrived on the 23rd of March, and that the master appointed Messrs. Hans Marcher and Co., of Hull, his agents, who acted as his agents accordingly; that this appointment was well known to Mr. Carnevalli, and on or about the 23rd of March, they informed him they would repay him any advances he had made, and that he disclaimed having made any. The advances also are controverted in part, and certain sums alleged to have been paid are said to have been so paid since the institution of the suit, namely, since the 14th May, 1849. The Reply puts in issue most of these averments, and alleges that Mr. Carnevalli was appointed agent, and that Hans Marcher and Co. were not. Then follows a long statement of items alleged to have been paid. It had been pleaded in defence, that the master had been superseded by his owners on the 23rd of April. This is not denied as a matter of fact; but it is contended that the owners had no authority to supersede the master, by reason that he, in pursuance of instructions, had entered into a Charter-Party with Mr. Carnevalli on the 10th of April. Upon this follows a long Rejoinder.

* 3 & 4 Vict. c. 65, s. 6.

in substance to this effect: alleging acts to prove that Hans Marcher and Co. were agents, and so known to be by Carnevalli; denying advances either to have been made or necessary to be made. Then, in order to show that the Charter-party was not binding, a correspondence is introduced, and the fact of the removal of the master by the appointment of Ravander, a person sent by the owners for such purpose, is fully detailed. I am sorry to say, next comes a Sur-rejoinder, which I do not deem it necessary to enter into in detail, save I will observe that it alleges that, on the 23rd March, Messrs. Walker and Lundgren (who acted for Marcher and Co.) "offered to take the business into their own hands, and repay Mr. Carnevalli for his expenses and trouble, but which offer he positively declined." This voluminous pleading is concluded by a Rebutter. On the part of Mr. Carnevalli there are three affidavits; on the part of the owners, sixteen.

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Upon a consideration of all these pleadings, and the facts contained therein, it appears desirable to ascertain how many of these issues it is necessary for me to try, and in what order. If there be any of the issues which would dispose of the whole case, either way, by the determination thereof, that issue ought to be first tried, and then the others, if necessary. The present claim being against the ship, on account of disbursements made on the credit of the ship, and from necessity, it may follow that, presuming for the moment that the alleged payments have been made, yet if there were an agent ready to make such payments on the personal credit of the owners, and he offered to pay whatever might have been previously disbursed, such an action as this cannot be maintained. The primary issue, then, is, whether there was any such agent appointed. The fact being averred, on the part of the owners, by way of defence, I think justice requires that the *onus probandi* should lie on them to establish the fact of there having been such an agent.

I must, however, to make the proceedings clear, and preserve the order of time, advert to the affidavit of Mr. Carnevalli. In that affidavit he states that, on the arrival of the ship, on the 22nd March, the master applied to him to

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act as his agent, and made the appointment by the paper marked A, attached to his affidavit, and drawn up by Carnevalli. The master confirms this statement, though why or wherefore he so acted I have not the slightest information from either of these deponents. Be that as it may, they swear positively to the fact. It is somewhat singular that I do not find any evidence whatever that this paper was produced to any one prior to the institution of this suit; and yet there were several occasions when, according to all probability, it would have been produced, if in existence. Now let us look at the paper. It is dated 22nd March, 1849, the very day when the vessel arrived at Grimsby:—

Grimsby, 22nd March, 1849.

I, the undersigned, commander of the Russian ship *Helena Sophia*, of Uleaborg, hereby engage Mr. L. von Carnevalli, of this place, as my ship-broker, and also authorize him to act for the best of the ship's interest, which is now in the Road, under average, and in a leaky state; and I further empower him to call a survey on board of my ship for the sake of having her immediate discharge effected; in fact, to do all and every business concerned with the average of the *Helena Sophia*, laden with wheat from Odessa, and bound for Leith, and I promise to refund Mr. L. von Carnevalli all such moneys and commission which he will have to pay by my order for the *Helena Sophia* out of the freight and average apportionments.

J. E. Forshall, master.

Now I must say, it might be a question deserving of very great consideration, whether an agent, accepting an agency on such conditions, namely, of being repaid out of the freight and average apportionments, could proceed against the ship for disbursements and advances. But for the present I pass by this question, as it is not necessary to decide it, and proceed in the course I have prescribed for myself.

Presuming that Mr. Carnevalli was so appointed agent, I am of opinion that he might, by competent authority,—that is, by the master or owners, or persons authorized to act for them,—have been removed, and another appointed in his stead; but then it would be but just that his dis-

bursements and a proper reward for his trouble should be paid. The question is, whether such appointment was made or not. This brings me to consider the affidavit of Messrs. Walker and Lundgren, one of them the managing clerk, and the other a clerk, in the establishment of Messrs. Hans Marcher and Co. I will state the principal contents of this affidavit, which is dated 13th June, 1849.

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Mr. Lundgren states that, on the arrival of the ship at Grimsby, he had an interview with Forshall, the master, and arranged with him that Marcher and Co. should act as the agents for the ship, and Forshall accordingly accompanied him to Marcher and Co.'s establishment at Hull, and the two deponents say that on his arrival an agreement was made, through them, that Marcher and Co. should so act; that they were both present at Grimsby on the 23rd March, and heard Forshall inform Carnevali that he had engaged Marcher and Co. to act as his agents, and at that time Walker asked Carnevali if he had made any payments, or had any claim, and he distinctly stated he had paid nothing and had no claim; and Lundgren swears that, on the 22nd March, he saw Forshall sign an order upon Marcher and Co., as the agents of the ship, to pay £30 to a fisherman, for towage and other services rendered to the ship (a copy of which is annexed), and which payment was made by Marcher and Co.; and Walker lastly swears that, on the 23rd March, Carnevali asked the deponent to let him act as a sub-agent for the ship, as deputy of Marcher and Co., but he (Walker) distinctly refused to employ him. This is expressly denied by Carnevali. In his first affidavit, dated 29th June, 1849, he swears that he never recognized Marcher and Co. as the agents of the ship, and never admitted to them that he had not made any advances on account of the ship, and had no claim against her owners. Forshall, the master, in his affidavit of the same date, denies that he appointed Marcher and Co. to act as agents for the ship, and swears that he applied for and received advances of money from Carnevali. The joint affidavit of Carnevali and Forshall, dated 15th November, 1849, contains some further denials, of no great importance in the cause. Car-

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Carnevali swears that, on the 23rd March, Messrs. Walker and Lundgren offered to take the business off his hands, but he positively declined. Forshall admits that he accepted advances of money from Marcher and Co. to the amount of £45, but swears that he did not receive this money from them as agents, but as the bankers of the owners in Russia, as they represented themselves to be. Which of these statements am I to believe? I think it is necessary to look at the remainder of the evidence before I attempt to solve that question. I will inquire whether the affidavit of Messrs. Walker and Lundgren be confirmed or not, or the affidavit of Mr. Carnevali and the master be contradicted,—confirmed they cannot be, because there is no affidavit from any one else on the behalf of Carnevali.

First, then, there is the affidavit of Mr. Newbald, cashier to the house of Wilson and Co., merchants, at Hull, and he swears that the master called at their office, and, arranging that they should act as agents for the ship, received from Wilson and Co. £15—nothing is said of this in the Act on Petition. Mr. Newbald then says that, on the 23rd March, he had an interview at Grimsby with Carnevali, who informed him that Forshall had appointed Marcher and Co. the agents for the ship, and that he (Carnevali) had applied to them to act as their sub-agent, and that Walker, their clerk, had told him they did not require a sub-agent. Now here are two important facts; he proves Carnevali's admission, first, of the appointment of Marcher and Co. as agents; secondly, that he had applied to act as their sub-agent, and they had refused, which he has denied on oath, though sworn by Mr. Walker. These are strong facts, for they tend to show that the master was acting in a very exceptional manner with regard to the agency of the ship.

I have now to direct my attention to a second affidavit of Messrs. Walker and Lundgren, which is in many respects a repetition of the former, but it states facts and circumstances with respect to the advances and payments, and the proceedings respecting the ship. I do not think it necessary to refer to it in detail. They say that they reported the ship, which was the act of the agent alone; that Forshall, the

master, signed the declaration, which contained the names of Marcher and Co. as agents, and they produce a copy of the declaration to prove it. There is no doubt, I think, that these facts are most distinctly proved, that they did report the vessel as agents, and that the master did sign the declaration. Then it states that Mr. Lundgren accompanied the master with the register to the Russian Consul—that is another fact of which there can be no doubt; that Marcher and Co. paid various sums of money to the master,—these are the very sums of money, I apprehend, which he represents as having received from them in the character of bankers; and that Forshall, the master, directed the pilot to apply to Marcher and Co. for the pilotage, and the document is annexed in his handwriting. All these facts tend to prove that Marcher and Co. were the agents, and that Carnevalli was not agent: indeed, I think it necessarily follows, that if Messrs. Marcher and Co. were duly appointed agents, Carnevalli was not truly and *bona fide* so appointed. In such a matter as this, there could be no plausible reason for two distinct and separate agents. The supposition is inconsistent with all probability, and such a double appointment would be wholly unwarranted. Without travelling further into the evidence, I am satisfied that it is distinctly proved that Marcher and Co. were appointed agents, and that Mr. Carnevalli was not.

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I am inclined to think that I have gone far enough to dispose of this case, for, as I have already intimated, it would be very difficult to maintain an action against the ship for money and necessities where there was an agent ready to supply the funds requisite for all proper purposes, and who, moreover, had offered to discharge all just demands. To allow an action under such circumstances would open the door very wide to collusive demands and to the unnecessary and unjust detention of foreign ships.

I will not, however, lay down the law on such a question as a universal proposition, nor decide this case upon it alone. I will look to other circumstances—to the demand itself.

The advances alleged in the Reply are as follow: 23rd

MARCH 25. March, £100; 14th April, £20; 1st May, £10; 5th May, £51. 5s.; travelling expenses, £13; making together, £194. 5s. Now for the sums said to be paid for the ship: these amount, according to the schedule, to £108. 2s. 10d., making a total of £302. 7s. 10d. Let us see how these demands are supported by the affidavits.

The first demand is £25 for a steamer, and the sum paid is £5. 5s. The Act alleges that £25 "had been paid" for the use of a steamer, and the sum admitted to have been paid, according to the affidavit, is £5. 5s., and no more. What is this but an admitted fraud? It is a downright fraud, without a shadow of palliation. By the Act, £212 is claimed for advances; by the affidavits, £181 was paid, —a difference of £31. And now for vouchers. The vouchers for payments made by Mr. Carnevalli are, for towage, £5. 5s.; lightering, £8. 5s. The first advance is alleged to be £100, on the 22nd March, the very day the ship arrived at Grimaby. Of the application of this money, and the purpose for which it was wanted, I have not a single word of evidence. Is it consistent with any degree of probability whatever? I think not. I think no honest man of business, in his senses, would have advanced to a foreign master £100 the very day of his arrival in port, and that master an entire stranger to him. But if it were advanced, I have a right to expect vouchers, and there is not one; and there is no reason assigned for the necessity of such advance; no account of its application, but a general statement of the master, to which, I think, no credit is to be attached. Can it be imagined that this Court, intrusted with new powers, under the Statute, for the double purpose of facilitating necessary credit for foreign ships, and protecting British merchants and tradesmen who make *bona fide* advances, and become creditors for necessary repairs and expenses, should consider such advances as these, even if made, just and necessary advances? Assuredly not. All the other advances said to have been made, if made at all, were after Mr. Carnevalli knew there was an agent appointed willing to make all necessary disbursements; many of them were after the master was displaced. Then, as to the

alleged disbursements, I will not enter minutely into the evidence; all are made without authority, all but £13. 10s. without a voucher, nearly all contradicted in payments by the evidence. To complete this case, Mr. Carnevalli pretends to enter into a Charter-party with a master about to be displaced; and I am quite satisfied, from the whole *res gestæ* and the evidence, that Mr. Carnevalli well knew that the master was to be displaced.

The result is, that I pronounce against this claim, and with costs, being well convinced that the claim has no foundation in truth and justice; but that Mr. Carnevalli and Forshall, the displaced master, have conspired together to set up a fictitious and fraudulent demand against this ship, and have endeavoured to support it by misrepresentation and false swearing.

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Claim pronounced against, as fraudulent.

Proctors: *Jenner*, for the party suing; *Coote*, for the owners.

THE "PURISIMA CONCEPCION" (TRIGO).—*Motion*.—In this case, the vessel, belonging to Spanish owners, bound from Drontheim to Bilbao, in October, 1848, was stranded near Bridlington. Mr. Waters Brambles, ship-agent, and also agent for Lloyd's, took charge of her, and employed men to unlade her, and the vessel was got off the strand, and conveyed into the harbour of Bridlington, where the cargo was sold, and dispersed. The charges of Mr. Brambles being disputed on the part of the owner, he arrested the ship in a cause of salvage. His claim was resisted, on the ground that he had been employed as agent; that he had rendered no personal service and incurred no personal risk, and therefore could not legally sue as salvor. The Court held* that the action was maintainable, but made no allotment of salvage pending a reference to the Registrar and Merchants of all the accounts of moneys received and paid, in relation to the cargo as well as the ship; reserving all questions, including costs.

Salvage. — Claim by an agent for Lloyd's, who was permitted, under the circumstances of this case, to sue as a salvor, but was held to be entitled to only his disbursements and an allowance of 5 per cent. on the sum advanced, as a reward for his trouble.

* *Antea*, p. 150.

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*Paraisima
Concepcion.*

The Registrar now reported that there had been expended by Mr. Brambles, on account of the ship, £95. 16s. 7d., and on account of the cargo, £264. 14s. 10d.; that by an Account, purporting to be an Account Sales of the cargo, brought in by the Proctor for Mr. Brambles (not verified on oath), it appeared that, after charging himself with £56. 3s., the sums expended exceeded the net proceeds of the cargo (£240. 12s. 8d.), and that nothing remained in his hands on account thereof. They further reported that the crew of the vessel, consisting of seven men, were not employed in assisting to effect the services charged for, by the employment of whom, various expenses, in many instances apparently excessive, would have been unnecessary.

Dr. Harding, for the salvor; *Dr. Addams*, for the owner.

JUDGMENT.

DR. LUSHINGTON.

This has been a most unfortunate case. The property originally was very small, and, it appears, is now reduced to next to nothing. The Court has throughout been placed in circumstances of very considerable difficulty. The cause commenced by the arrest of the ship, and the ship only, on the 10th of March, 1849, in an action entered on behalf of Mr. Brambles, in the sum of £300, as a salvage suit. On the 22nd March, Mr. Coote appeared for the owner, in objection to Mr. Brambles suing as salvor, and prayed to be heard on his Petition. The Act was brought in, and an Answer given to it, and I was called upon to hear the case as it stood, in that naked state. After having read the Act, and considered the exhibits, it appeared to me that I was not in a condition at that moment to decide the case; indeed, I had not sufficient evidence to enable me to do so justly, and if I had released the ship, I should have acted unjustly, as I should have taken out of the hands of the asserted salvor his only security for his demand. I reserved the question of costs until I had heard the case argued on the main question. Accordingly, the main question was then set forth in an Act on Petition, and the case finally came under the consideration of the Court on the 28th July. On that occasion I do not deny that I

felt considerable difficulty and doubt as to whether or not Mr. Brambles was entitled to sue as salvor. It appears that, on the vessel arriving at Bridlington, Mr. Brambles, who filled the office of Lloyd's agent, went down to her, tendered his assistance, and employed persons, by whose means the ship was brought into a place of safety, and the cargo unladen. It was stated that he acted in all these matters as agent, and agent only; that he never performed any part of the work with his own hands, or incurred any personal risk, and was therefore not entitled to commence an action as a salvor. I think, assuming that all the disbursements were properly made, it would have been competent to Mr. Brambles to have sued in another form of action, under the Statute, for necessities; but this cannot afford a foundation for a suit for salvage. I am not able to find any case precisely resembling this; but there were cases, not reported, in which similar difficulties had arisen, which are now removed by the Statute. After having very much considered this case, I do not think that I ought to reject the claim of Mr. Brambles as salvor. I consider it difficult to draw the line between a person acting as agent and as salvor; but I wish it distinctly to be understood that this case must not be drawn into a precedent, or that I am deciding that a person who acts as agent is entitled to sue as salvor; and in allowing the party to sue in this case, I hold that Mr. Brambles is entitled to be paid for no more than the actual sums he disbursed to other persons (who are the persons entitled to be considered as properly salvors), and for a reward and compensation for his trouble, and no further.

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*Purísima
Concepcion.*

With respect to the Report of the Registrar and Merchants, they have come to the conclusion that Mr. Brambles is out of pocket, on account of the ship, £95. 16s. 7d., and with regard to the cargo, which is not proceeded against, he is out of pocket £264. 14s. 10d.; and I apprehend the Registrar and Merchants have reported to me all the *bonâ fide* claims, and the only doubt is as to the expenses falling on the ship itself, under the following objection. It appears that the crew of the vessel, consisting of seven men,

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*Peristima
Conception.*

were not employed in assisting to effect the services, "by the employment of whom, various expenses and charges, contained in the Schedules, in many instances apparently excessive, would have been rendered unnecessary." No doubt this observation may be true; but it does not follow that this is to be charged to the account of Mr. Brambles, for it may happen, as it has happened in many other cases, that the sailors of a foreign vessel are unwilling to render assistance.

The result is, that Mr. Brambles,—laying out of consideration the expenses as to the cargo,—is out of pocket £95. 16s. 7d. It appears to me that his interference was accepted by the master, and I see no reason to think that he was actuated by any improper intention, or any wish but to discharge his duty fairly and honestly. The affidavit of Lieutenant Foord, of the Coast Guard, states that if Mr. Brambles had not promptly used proper measures in getting the cargo out of the ship, and the ship into the harbour, on the 6th, 7th, and 8th of October, either on the 9th or 10th the ship would have been in all probability wrecked by the violence of the winds and sea. I am of opinion that Mr. Brambles is entitled to be reimbursed the sum of £95. 16s. 7d.; and I am of opinion that he is entitled to some reward for his trouble; but, under the unfortunate circumstances of the case, I think it right to reduce it to the smallest sum, and I shall allow him 5 per cent. on the money he advanced.

With regard to the costs, I am clearly of opinion that I am bound to give him the costs in the original proceeding, and I see no reason why he should not be entitled to the remainder of his costs.

Proctors:—*Smals*, for the salvor; *Coste*, for the owner.

END OF HILARY TERM, AND OF THE SITTINGS
AFTER TERM.

EASTER TERM, 1850.

High Court of Admiralty.

APRIL 16.

1st Sess.

THE "OSMANLI" (CORBETT).—*Cause, by Act on Petition.*—This was an action by the owners of the late schooner *Cape Packet* against the iron screw steamer *Osmanli*, to recover for the total loss of the schooner in a collision between the two vessels, a cross action having been entered by the owners of the *Osmanli*.

Collision between a steamer and a sailing-vessel, — the former held to be in fault, for not wearing in time. — Effect of protests, as evidence in such cases.

The Act on Petition, on the part of the owners of the schooner, alleged that, in the prosecution of her voyage from Antwerp for Cork, with a cargo of wheat, when standing towards the land on the Irish coast (distant twenty to twenty-five miles), at half-past eleven P.M. of the 21st December last, the wind being E.S.E., the night starlight, vessels being visible at least a mile off to seaward, the schooner being close-hauled on the starboard tack, a light was seen under her lee, which soon appeared to be approaching her; that the mate held up her signal lantern to leeward for seven or eight minutes, and, as the light still kept approaching the schooner, the watch on deck loudly hailed the vessel (the *Osmanli*) to keep away, notwithstanding which, she came stem on (steaming at full speed) into the schooner, striking her with such violence that she sank very shortly, her master and one of the crew being drowned; and that the collision was solely occasioned by the misconduct of those on board the *Osmanli*, in not keeping a good look-out, or otherwise.

The Answer, by the owners of the steamer, alleged that she was bound from Palermo to Liverpool with fruit and general merchandise; that on the night in question, which

APRIL 16.

Osmanli.

was very dark and overcast, the watch was set; one man being stationed in the fore-castle, and three men on the main deck, keeping a good look-out, three lights being hoisted; that there was a strong breeze from E. by S., with rather a high sea, and the steamer held her course, heading S.S.E., close-hauled on the port tack; that the look-out man in the fore-castle made out a vessel (the *Cape Packet*) on their lee-bow, which, in a few moments, showed a light; and he then saw she was steering a N.E. course, and standing directly towards the *Osmanli*, as if to cross her bows; that no hailing was heard from the schooner, and the look-out men, instantly on discovering the course of the schooner, called out to the man at the wheel "Hard a-port," which was repeated by the mate, who ordered the engine to be stopped; that both orders were immediately obeyed, and the *Osmanli* began rapidly to pay off; but the schooner closed upon them too fast, without altering her course, and the vessels came in collision, two or three minutes only having elapsed from the time the schooner was first seen; that if she had made the slightest effort to avoid the collision, it would not have occurred; that the steamer was proceeding at a moderate speed (5½ knots), and that the collision was wholly imputable to those on board the *Cape Packet*.

The Court was assisted by two Elder Brethren of the Trinity House.*

Dr. Addams and *Dr. Twiss*, for the schooner; *Dr. Haggard* and *Dr. Robinson*, for the steamer.

SUMMING UP.

DR LUSHINGTON (*addressing the Elder Brethren*):—

Gentlemen,—I think it will be expedient, in the first instance, that I should direct your attention to, that which has formed the principal part of the argument on behalf of the owners of the *Osmanli*, namely, the situation and conduct of the *Cape Packet*; and whether any blame is attributable to her, we will consider to be the first question in this case.

Facts.

The facts lie in a very narrow compass. She was at the

* Captain Wellbank and Captain Farquharson.

time, from twenty to twenty-five miles off Cork, standing to the N.E., on the starboard tack, and close-hauled; she saw the steamer, though she did not know that it was a steamer, at a certain period antecedent to the collision. It has been very strongly contended by the Counsel you heard last, that it was the duty of the *Cape Packet* to have shown a light as soon as she saw the steamer. Now you are very well aware that no question has been more often mooted, and left more unsettled, than this—whether it is the duty of a sailing vessel at night to show a light. Beyond all doubt, it has been determined that there is no such general obligation; at the same time there have been occasions on which, for the sake of avoiding a misfortune which was in all human probability likely to occur, it became the duty of a vessel to show a light. On the very last occasion when I was favoured with the assistance of two gentlemen from the Trinity House, it was determined, in the case of the "*Fairy*," that, in the river Mersey, on a very dark night, a vessel being towed up to George's Dock should have shown a light. That was an exception to a general rule. Whether there is such exception on the present occasion I will not positively say, because I do not think it essential to decide that point. The character of the night is differently represented on either side. On the part of the *Cape Packet* it is alleged to have been starlight; on the part of the steamer it is said to have been a dark night. It does not appear to me, looking at all the facts and circumstances of the case, that it was a very dark night, or that the weather was very peculiar in that respect.

As the *Cape Packet* did show a light, it will be better, perhaps, to consider whether she exhibited it in due time. What is the evidence on that point? You have heard a great deal of discussion upon the contents of the Protest which has been produced on behalf of the *Cape Packet*, and it is said that its representations are at variance with the statement subsequently to be found in the affidavits. Let me first draw your attention to the Protest itself, and consider what is its true and fair construction.

It is said that the Protest is the first document in a cause, *Protests*, and generally made *recenti facto*; but it frequently happens

APRIL 16.
O'Mahon.

The duty of
showing a light.

ARMS 18.

Osmani

that it is not made until a later period. In this case the Protest of the *Osmani* was not made until the 7th of January; but it ought to be made as soon as possible after the circumstances occurred. The Protest of the *Cape Packet* bears date on the 24th December, the circumstances having taken place on the 21st of that month, which is as soon as reasonably could be expected. It is said that the parties ought to be bound by the Protest, whatever may be its terms, and that any statement subsequently made must be cast aside, if it contradicts it, and the Protest adhered to. Now I dissent from that doctrine altogether, and for various reasons. The statement in the Protest is a statement given by unlearned men—in this instance it was made by the mate alone; but sometimes it is made by masters, who are not, and cannot be expected to be, very expert in relating their story clearly before Notaries Public, who, whatever may be their merits in drawing a clear consecutive statement, I never find display that merit in drawing a Protest; and both the Protests in this case are very inartificially drawn. I never can trust, whatever be the case, the accuracy of a Notary Public, or the exercise of his judgment, when he is selecting such facts as he thinks right to put in a Protest. He may not be aware of the real point at issue; and to hold, therefore, that a Protest is to override all other evidence, would be to embark in a course of downright injustice.

In the Protest of the *Cape Packet*, the parties on board are made to speak first as to the collision: "About half-past eleven on the night of the 21st inst., the vessel being then between twenty and thirty miles off the land, and Cork harbour bearing N. and by W., the wind being about E.S.E., with strong weather, the vessel being under double-reefed mainsail," and so on, the collision took place. That is the way it is stated, and you see how inartificially. Instead of taking up the matter chronologically, it commences with the collision, and then it goes on to state the facts afterwards. The main object of a Protest is, to support demands against the Underwriters or Insurers; it has no reference to proceedings in this Court. A Protest is of great importance in salvage cases, because there the parties make the best case

they can against the Underwriters. The appears go on to say: "Being their watch on deck, about half an hour previous to the collision and striking, they saw a white light in the rigging of a vessel, which they afterwards discovered to have been the steamer, and as soon as they perceived the steamer approaching them, and being then about fifty fathoms off, they shouted and hailed the steamer, and Barrett also held up a lantern and light, but unavailingly; she did not alter her course, but ran into and struck the *Cape Packet*." Now it is certainly true, on the first blush, that this statement would represent that the steamer was not discovered until she was about fifty fathoms off; that they then shouted and hailed, and held up a light, all at the same moment. It appears to me that, although due deference is to be paid to this Protest, yet, if you think the statement subsequently made is a more correct one, you are fully at liberty so to consider it, notwithstanding the apparent confusion between the two. It appears to me exceedingly doubtful whether or not these persons, whatever might have been the opinion of the Notary, intended by these words to declare that all these circumstances were exactly contemporaneous. That they were so is against all probability, and I do not think it is likely that they would have made such a statement. But be that as it may, let us look at the evidence. They say that they held up a signal lantern for seven or eight minutes. That is disputed, and it is said that it was only two or three minutes. They then say that the *Osmanti* came stem on, and struck the schooner amidships on the larboard side; and there is an end of all that was done on the part of the *Cape Packet*. What ought the *Cape Packet* to have done? First, it is said, there was not a good look-out. I see no reason to conclude that she had not a sufficient look-out. Then, it is said she did not show a light until three minutes before the accident. According to the statement, on behalf of the *Osmanti*, she did show a light three minutes before the actual collision, and the question will be, whether even then she did not show a light in sufficient time; because if you should be of opinion that three minutes was sufficient time, if there was a due regard to

Aves 1d.

Osmanti

Arms 16.

Osmanti.

expedition, and a good look-out on board the *Osmanti*, to have enabled her to prevent the collision, there is an end to the whole question of the *Cape Packet*, not showing a light in time. Let us see how this stands. I take the statement of the *Osmanti* from her sworn Affidavit in Retention. It is there said, "There was a strong breeze from E. by S. about E. S. E., as alleged — with rather a high sea, and the steamer held her course heading S. S. E., close-hauled on the port tack; that between half-past eleven and twelve o'clock, &c. the look-out man on the fore-castle made out a sail on their lee bow, and immediately called out, 'Sail on the lee bow;' that the said vessel had no light on." Now, to show how the Protest is drawn up, the Protest on behalf of the *Osmanti*, after stating that the night was very dark, goes on to say, "a sail was observed on our lee bow, apparently standing towards us, and the order was immediately given to port our helm and stop our engines, both of which things were instantly done, and our vessel began to pay off rapidly, but, notwithstanding, in about three minutes, she came into collision with the other vessel." Why, we find, in this Protest, nothing said here about lights. Then, after having gone through the facts of this unfortunate collision, and stated that the *Osmanti* bore up for Gork, the Protest proceeds: "When the *Cape Packet* was first observed on our lee bow, as before stated, we were heading S. S. E., under steam and fore and aft sails, and going at the rate of not more than from five to five and a half knots." I think I have said enough to justify my observation, that we must not be led altogether by the Protest. They saw her, according to their statement, before they saw a light; they saw that she was standing on the N. E., and orders were given to put the helm to port and stop the engines, which was immediately done. They say that the steamer began to pay off, but the *Cape Packet* came on with much force, being close-hauled, and that the collision arose in consequence of her so coming athwart her bows.

Questions.

Now, gentlemen, you will consider whether all was done that could be done, and with due expedition; or whether,

supposing the engines had been stopped, it is possible that such a collision as this could have occurred, and with a force that not only sent the *Cape Packet* to the bottom, but stove in the bows of the steamer. If the engines had been stopped, there would have been a great diminution of the power with which the blow was struck. With regard to the rate at which the *Osmanli* was going, and whether it was safe or not, I must leave that to your consideration. The question, then, will be, whether you consider the *Cape Packet* to blame in any of the circumstances set forth in the pleadings and commented upon by Counsel; or whether you think the *Osmanli* was to blame for not having, with greater expedition, adopted those measures which were requisite in order to avoid the accident.

X-1861-76.

Osmanli.

CAPTAIN WELLBANK.

OPINION.

We are obliged to limit our judgment in this case to two facts in dispute—the speed of the *Osmanli*, and the time that elapsed between the period when she first perceived the light, and the collision. The *Osmanli* was running under both sails and steam, about six knots an hour; three minutes elapsed from the time when she first perceived the light of the *Cape Packet*, and three minutes was enough to enable the steamer to wear. The steamer is to blame, and the other not.

PER CURIAM.

JUDGMENT.

I pronounce for the damage done to the *Cape Packet*, and dismiss the cross action, with costs.

FECTORS:—*F. Clarkson*, for the *Cape Packet*; *Tobbs*, for the *Osmanli*.

Archæ Court of Canterbury.

2nd Sess.

APRIL 23.

Articles
against a clerk
in Holy Orders,
under the 68th
Canon, for re-
fusing to bury
the corpse of
a parishioner
(convenient
warning having
been given be-
fore), on the
ground that the
deceased had
died in a state
of intoxication,
— sustained :
Sentence, sus-
pension for
three months.

THE OFFICE OF THE JUDGE PROMOTED BY COOPER v. DODD.—*Cause.*—This was a proceeding, under the 68th Canon, by Letters of Request from the Lord Bishop of Ely, promoted by Mr. Charles Henry Cooper, the Coroner for Cambridge, against the Rev. Edward Dodd, B.D., Vicar of Saint Peter, Cambridge, for having refused to bury in the churchyard of that parish the corpse of a parishioner when applied to in that behalf, after convenient warning given him thereof. The Decree issued from this Court on the 12th February, 1849, and was personally served, but no appearance being given, on the 2nd May the Court pronounced Mr. Dodd in contempt for not appearing, and a Decree to see proceedings issued and was personally served; no appearance being given, in Trinity Term, Articles were brought in, and the Court assigned to hear on their admission, whereupon Mr. Dodd appeared in person, under Protest, which, when subsequently extended, was in the following form :—

Cathedral Hotel, St. Paul's, London, June 9th, 1849.

Understanding that the Official Principal of the Court of Arches has pronounced me in contempt, for not complying with a primary Citation, I, the undersigned, deny his jurisdiction and right to do so.

I ask, very respectfully, why am I cited out of my proper diocese, that of Ely?

Is it because of Letters of Request on the part of the Bishop?

Then on what does the Bishop ground his said Letters?

Is it on the (so called) 68th Canon of 1603?

Now I protest and declare

that the (so called) 68th Canon is bad in law and in religion;

that the Letters of Request are bad in law and equity;

that the primary Citation also is bad in law, and that, consequently, the Decree of Contempt is null and void;

and that all proceedings depending upon it are, and will be, or would be, utterly unlawful and invalid.

And I claim for my defence and vindication the laws of the realm, whether secular or otherwise, each and every, and particularly the Queen's Majesty's Ecclesiastical Law, as distinguished from the law and practice of the Arches Court.

And more particularly I claim the Statutes and the Canons hereinafter mentioned or implied, to wit :

23 Hen. 8, c. 9.

25 Hen. 8, c. 19.

25 Hen. 8, c. 21, s. 1, with 16 Ric. 2, c. 5.

Canons and Ratification of 1603.

Ratification and Canons of 1640.

(The valid Canons for their validity, and the invalid, unlawful ones for their intention.)

Not debarring myself from any available sources of authority and information.

The jurisdiction, then, and the exercising of it, being impugned, as unlawful, it is submitted respectfully to the Official Principal for his consideration, whether our law permits any man to be judge in his own cause, seeing that the Decree of Contempt must be first pronounced upon before the suit can be proceeded with.

Edward Dodd, B.D.

This Protest, or statement, the relevancy of the matters contained therein being simply denied by the Proctor for the Promoter, came on for argument. 1849. Nov. 2.

Mr. Dodd, in person, supported his Protest.—By the 6th section of 25 Hen. 8, c. 19, the 68th Canon, when made, was illegal ; it was repugnant to the common law of the Church and of the realm. The Judge of this Court renders himself liable to punishment, under the 94th Canon, for citing a party out of his diocese ; the Judge, therefore, has an interest in this case. By the 68th Canon, every person not denounced excommunicate *majori excommunicatione* has a right to Christian burial ; whereas there are many persons not so denounced whom it would be very improper to bury with the words used in the Book of Common Prayer,—infidels and blasphemers. The Canon, therefore, commands that which is impious and profane. What was bad originally, cannot be made good by custom. The Canons of 1603 have not the sanction of the Church, as such. The 199th Canon declares that the National Synod is that which ex-

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presses the voice of the Church of England; the 68th Canon is not the voice of a Synod, and does not express the true voice of the Church of England; it was enacted by the Provincial Synod of Canterbury, but rejected by that of York in the first instance, and no Archbishop was present at the Synod. The Canons of 1603 had the royal assent in the King's Parliamentary Supremacy only, not his Common Law Supremacy. Under the 12th Canon of 1640, the Bishop is precluded from giving these Letters of Request; he should have heard the case in person; the Canon commands it, and the Clergy Discipline Act does not prohibit it.

Dr. Haggard, contrà.—The Protest rests on two grounds: 1st, that this Court has no jurisdiction; 2ndly, that, if it has jurisdiction, the Judge, through an error, is incompetent to proceed in the case. Neither of these objections is sustainable. The defendant contends that the Canons of 1603 do not bind him; that those of 1640 are more binding; but he has adduced no authority, and that of *Aylife* is against him. The Statute of Victoria (the Clergy Discipline Act) gives the Court jurisdiction in this case. The refusal to bury a corpse, after convenient warning given, is an ecclesiastical offence, and the party offending may be proceeded against in this Court. *Kemp v. Wickes*.^{*} *Martin v. Escott*.[†] *Titchmarsh v. Chapman*.[‡] *Nurse v. Henslowe*.[§]

Dr. Bayford, on the same side.

Nov. 13.

The Court overruled the Protest, holding that there was no doubt as to its jurisdiction; that the Canons of 1603, although not binding, *proprio vigore*, on the laity, do bind the clergy; that the Canons of 1640 never had any binding authority in these Courts; that, under the Clergy Discipline Act, the Bishop of Ely had a discretion to hear the matter himself or to send it to this Court, and that he having exercised that discretion, and the Letters of Request having been sent and accepted, there could be no doubt that the Court was duly in possession of the cause.

Mr. Dodd, in obedience to the assignation of the Court,

^{*} 3 Phill. 264.

[†] 2 Curt. 692.

[‡] 1 Robert. 175. S.C. 3 Notes of Ca. 376.

[§] 3 Notes of Ca. 272.

appeared absolutely by Proctor, and Articles were admitted without opposition, pleading as follows:—

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1—3. That Mr. Dodd, on the 24th July, 1844, was collated and admitted to the Vicarage of Saint Giles with Saint Peter, Cambridge, the said vicarage comprising two separate benefices, and having separate churches, and that on the 30th and 31st December, 1848, he was and still continued vicar of the said vicarage and parish church, and as such, and as a priest in Holy Orders of the Church of England, he is obliged to observe the laws, canons, and constitutions ecclesiastical of this realm. 4. Pleads the Clergy Discipline Act, and the 68th Canon. 5. That, on the 26th December, 1848, William Stutes, a parishioner of the said parish of Saint Peter, was found dead therein; that the verdict of the Coroner's Inquisition declared that he "was found drowned and suffocated in a certain ditch there situate, no marks of violence appearing on his body; but how or by what means he became drowned or suffocated, no evidence thereof doth appear to the jurors;" that, pursuant to the Act 6 & 7 Will. 4, c. 86, an order for burial was given by the deputy-coroner on the 28th, and delivered on the same day to Mr. Dodd, who, after reading the order, returned it, saying, "he should decline to receive it, unless the coroner would send the depositions and the verdict;" and on the following morning he repeated such declaration, adding, "unless the depositions and verdict were supplied to him, he would not allow the body to be taken into the church, nor read the Funeral Service." 6. That, on the 29th December, Elizabeth Stutes, wife of John Stutes (son of the deceased), informed Mr. Dodd that he, John Stutes, wished his father to be buried on the Sunday following, at two o'clock in the afternoon, at Saint Peter's Churchyard; that upon Mr. Dodd telling her that he did not think he could bury him, and upon her inquiring the reason, he stated, "because he died in a state of intoxication." 7. That, on Saturday, the 30th December, the said John Stutes informed Mr. Dodd that he wished his father to be buried the next day in the churchyard, and that a grave was ready; that in the course of that interview with John Stutes, Mr. Dodd read to him portions of the Burial Service, and told him that "he could not read such service over the remains of his father, either at that or any other time, nor bury him; as he had died intoxicated," adding, "Why do you not go to the Dissenters? they are not so scrupulous;" that John Stutes informed him that if he (Stutes) could get a grave dug at the Cemetery he would, rather than the body should

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remain unburied, as it was changing very fast; but, that if he could not get the grave there, he should expect the vicar would bury him at the time fixed;" that on the next morning (Sunday, the 31st), John Stutes saw Mr. Dodd at half-past eight o'clock, and told him that "he could not get a grave in the Cemetery on that day, and that there was no alternative but that the burial must take place in the churchyard on that day, and that he should expect his father to be buried there, according to the forms of the Church of England," adding, that "relatives and other friends had come from a distance, and could not stop beyond it, and that the body was so offensive that the house was scarcely bearable." 8. That, on Sunday, the 31st, both before and after Morning Service at the Church of Saint Peter, notice was given to Mr. Dodd of the desire, on the part of the family of the deceased, that he should be buried at or about two o'clock in the afternoon in the grave that day prepared for his remains in the churchyard of the parish of Saint Peter, and that Mr. Dodd, on the occasion of those separate notices, declared that "he would not bury him." 9. That the corpse, accompanied by the friends of the deceased, was, at the time intimated, brought to the said church, and placed on the bier, near to the door, which was found to be closed, and it so remained closed for upwards of an hour, during which John Stutes, the son, and the other friends of the deceased, remained waiting for the burial of the corpse; and that, after the expiration of that period, John Stutes and the other friends of the deceased returned back with the corpse, which was interred in a Cemetery on the following day.

March 5.
ARGUMENT.

Dr. Haggard and *Dr. Bayford*, for the Promoter, submitted that all the necessary facts, including the convenient warning and the refusal, were distinctly proved, and that the excuse alleged, that the party deceased had died in a state of intoxication, was no justification of a refusal to bury the corpse; citing *Todd's Case*.*

Dr. Addams, for the Defendant.—The proceedings in this case are null and void on various grounds. 1. They have been *coram non iudice*. The preferment held by Mr. Dodd is one of which the Bishop of the diocese is the patron. The Clergy Discipline Act† directs that, in such a case, the Archbishop is to act in his stead, who should have had the option

* 3 Notes of Ca. Supp. li.

† 3 & 4 Vict. c. 86, s. 24.

of doing the acts directed to be done by the Bishop before the case was sent here by Letters of Request, and the Archbishop might then have pronounced a less sentence than suspension, which this Court is compelled to pass, under the Canon. 2. There is no proof that Mr. Dodd is Vicar of St. Peter's. 3. The Articles do not impute any offence to Mr. Dodd on which a sentence can be founded. The simple refusal to bury is no offence under the Canon, which requires convenient notice, and although the heading of the Articles alleges, "after convenient warning given you thereof," the antecedent is, not the corpse being brought to the churchyard, but "when duly applied to on that behalf," and the deficiency is not supplied by the body of the Articles. In a criminal plea, charging an offence under a particular Statute, you must so lay the offence as to bring it within the Statute. The plea should negative all the exceptions, and expressly aver that the party deceased was not *feto de se*, nor excommunicate, nor unbaptized. *Phillipps, Ev.* Rex v. Jervis.*† The notice, to be convenient, or competent, must have been given by a person competent to give it, and Stutes, the son, says he did not give notice.

Dr. R. Phillimore, on the same side.

SIR H. JENNER FUST.

(After stating the proceedings in the cause.) The Court has thought it necessary to state these proceedings with some particularity, because the cause, beginning at the commencement of 1849, has been protracted until now, and it appears that the delay has been in some measure increased by the want of appearance on behalf of Mr. Dodd, and by his subsequently appearing under Protest, which was argued at length, and overruled.

This proceeding is under the 68th Canon, which inflicts the penalty of suspension for three months upon a minister who refuses to bury the corpse of a parishioner which shall be brought to the churchyard, according to the form set forth in the Book of Common Prayer, convenient notice

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JUDGMENT.

* 1 Vol. c. 7, s. 4.

† 1 Burr. 148. S.C. 1 East, 443.

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having been given to him before, unless it should appear that the party deceased was under sentence of the Greater Excommunication for some grievous sin unrepented of. But, according to the Rubric, there are two other cases in which the Service is not to be read, namely, where the person is unbaptized, or where he shall have laid violent hands upon himself. The question is, has Mr. Dodd so conducted himself, in refusing to bury the corpse of this person, as to have incurred the penalty of the Canon?

It will be proper to consider, in the first instance, some of the objections taken to the jurisdiction of the Court, and the form and substance of the Articles.

Objections to
the jurisdiction.

The first objection goes to the very root of the whole proceeding. The cause is brought here by Letters of Request from the Bishop of Ely, who is patron of the Benefice, of which Mr. Dodd is the incumbent, and unless power is given by the Act 3 & 4 Vict. c. 86, this Court has no jurisdiction to entertain the suit.

(After reading the first twelve sections of the Statute.)

These sections refer to the proceedings either before the Commission, or, after the issuing of the Commission, at the hearing before the Bishop himself. But the 13th provides that the Bishop may, if he think fit, send the case in the first instance, before a Commission of Inquiry is issued, or after the Commissioners shall have made their report, by Letters of Request, to the Court of Appeal of the province, to be there heard and determined. There is nothing compulsory upon the Bishop; he has the option, and is at perfect liberty to adopt which course he thinks proper.

If the Act had stopped here, there could be no doubt of the right of the Bishop to take the course he deemed best adapted to the circumstances of the case,—to hear it himself, or to send it to this Court to be heard. But by the 24th section, where the Bishop is the patron of the Living, he is prohibited from doing any Act save that of sending the case by Letters of Request to the Court of Appeal. It is upon the construction of this section that the Court has been called upon to pronounce that it has no jurisdiction in this case.

This objection was, in fact, urged by Mr. Dodd personally when his Protest was argued, and the Court was of opinion that the objection could not be maintained; for the Act by express words saves to the Bishop of the diocese, patron of the Living of which the party accused is incumbent, the right of sending Letters of Request: "That, when any act, save sending a case by Letters of Request to the Court of Appeal of the province,"—saving the right of the Bishop to that extent,—“is to be done, or any authority is to be exercised, by a Bishop under this Act, such act shall be done or authority exercised by the Archbishop of the province, where the Bishop who would otherwise do the act or exercise the authority is the patron of any preferment held by the party accused.” If this be not the meaning of the words, “save sending a case by Letters of Request to the Court of Appeal,” they have no meaning whatever. I am clearly of opinion, as I was when the Protest was argued by Mr. Dodd, that this objection cannot be sustained; that the Bishop is at liberty to send the case here by Letters of Request, although he is patron of the Benefice of which the party accused is the incumbent.

It is said, this is a hardship upon the party. It possibly may be so; but I cannot go out of the words of the Act, by which a general power is given to the Bishop to send the case here by Letters of Request. The Archbishop, it is said, might, if he had had an opportunity of exercising jurisdiction, have admonished the party, who might have submitted to his authority; and he is deprived of this opportunity by the case being sent at once by Letters of Request to this Court. But the Bishop is not required to give the Archbishop the discretion of proceeding to hear the case, or to send it here by Letters of Request; it is his own discretion he is to exercise. And even if the case had gone to the Archbishop, and proceedings were commenced before him, the Archbishop could not, under the 6th section, without the consent of the party proceeding, inflict any other sentence than that which the law prescribes for the offence imputed to the party.

Another objection taken is to the Citation,—an objection

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which was also taken by Mr. Dodd, when he argued the question of Protest,—namely, that he was not rightly described in the Citation, for that Saint Peter's is not a Vicarage, but a Perpetual Curacy. I have already observed that no Allegation has been given in on behalf of Mr. Dodd, and there is no evidence before the Court as to what the precise nature of the Benefice of Saint Peter's is. But Mr. Dodd is cited as Vicar of the Parish Church of Saint Peter's; he has appeared in that character to the Citation, and there is nothing before the Court which would show that Saint Peter's is not a Vicarage; on the contrary, it would seem that it is a Vicarage, so far as the proceedings in the cause go. The instrument of his Collation states that it is to "the Vicarage of Saint Giles with St. Peter's, in Cambridge;" and it is proved that, from that time (1844), he was considered as, and that he performed the duties of, incumbent of Saint Giles and Saint Peter's. Mr. Gallagher, clerk to the secretary of the Bishop of Ely, infers (whether right or wrong) from the instrument of Collation, that Saint Peter's is a Vicarage as well as Saint Giles's. It is clear that the Benefice of which Mr. Dodd is incumbent consists of two parishes, separate and independent, except so far as forming one benefice; they have separate churches, separate burial-grounds, and separate officers. I am of opinion, upon this ground, that, Mr. Dodd having been inducted as Vicar of the parish of Saint Peter's, and having appeared to the Citation,—there being no plea on his part setting forth that the parish was wrongly described,—this objection cannot be maintained.

Other objections were raised, one of which was that the Articles should have alleged that the party deceased was not excommunicate; that he had been baptized; and that he had not laid violent hands upon himself. No case was referred to in this Court, in which it has been held to be necessary that the Articles should contain these averments. Reference was made to proceedings under the Game Laws, in which it is necessary that the want of qualification to kill game shall be specified in the information before the magistrates. But, even supposing that the proceedings at Com-

mon Law were to govern this Court, there is this material difference: that is a summary jurisdiction given to justices to inflict a penalty, and in order to bring parties within that jurisdiction, it is necessary that the proceedings should show that they were not exempt by possessing qualifications to kill game. But in this instance, there is a general obligation upon a Minister of a parish to read the service of the Church over the dead body of a parishioner, except in certain cases. To bring a person within the summary jurisdiction of the magistrates, the qualifications must be negatived; but it is not necessary to negative the exceptions here; it is for the party proceeded against,—if any defence is to be set up, that the deceased was excommunicated (supposing this to attach after the Statute), or that he was unbaptized, or had laid violent hands upon himself,—to make out this ground of defence to the charge.

I hold, therefore, the jurisdiction of the Court to be established beyond all doubt; that the appearance of Mr. Dodd to the Citation, as the Vicar of Saint Peter's, in which character he is cited, is sufficient, there being no plea that the description is erroneous; and that it is not necessary, in proceedings in this Court, to negative in plea the exceptions,—that the party deceased was unbaptized, or excommunicate, or had laid violent hands upon himself.

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The jurisdiction established.

(After reading the substance of the Articles.)

I am of opinion, that the offence imputed to Mr. Dodd is sufficiently stated in these Articles to entitle the Promoter to proceed against him, and establish, if he can, the facts there alleged; and if they shall be established by evidence, the Court will hold that Mr. Dodd is brought within, and subject to the censure of, the 68th Canon; and this brings me to the consideration of the evidence.

An offence alleged.

There are some facts which are beyond dispute. It is quite clear that Mr. Dodd was the Minister of this parish where this person died, and at the time when application was made to him for the burial of the corpse. It is quite clear that the deceased was an old inhabitant of the parish, and it is proved that he was a member of the Church of England. It is also established that the deceased was found

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suffocated in a ditch, according to the Verdict of the Jury, which is prefixed to the deposition of the Deputy Coroner before whom the inquiry took place,—that he was found in a ditch, on the morning of the 27th December, suffocated and drowned, without marks of violence on his body ; but there was no evidence of the manner in which he came to his death. There is also no doubt, it appears by the evidence of Ready and Wilson, that the Coroner's Certificate was given (whatever may be the effect of it under the Registration Act) for the burial of the corpse, that the provisions of the Registration Act had been complied with, and there was no impediment on that ground to the interment of the corpse with the Burial Service. Wilson, the constable, delivered this Certificate, which he had received from the Deputy Coroner, to Ready, who placed it in the hands of Mr. Dodd on the 28th, the day on which the Inquest was held ; and Mr. Dodd, according to the statement here, declined to receive the Certificate unless the Verdict and Depositions were sent to him. But there seems to be some misapprehension on this point,—at least whether more than the Verdict was required. However, the Deputy Coroner, before whom the Inquest took place, declined to make any addition to the Certificate, inasmuch as it was drawn out pursuant to the directions of the Act. It is also proved that the body was not buried on the 31st December in Saint Peter's Churchyard, but was interred in the Cemetery on the following day. The question is, whether Mr. Dodd, having received convenient notice before, did decline or refuse, on the 31st December, to bury the body of this person ; and it is upon the evidence of the six witnesses, who have been examined on this part of the case, that this question must depend.

Evidence.

The Verdict having been given on the 28th December, the first interview which took place between Mr. Dodd and any part of the family of the deceased was on the 29th, between Mrs. Stutes, the daughter-in-law of the deceased, the wife of the son, and Mr. Dodd ; and the evidence of Mrs. Stutes is to this effect : That she saw Mr. Dodd (who sent for her) on that day ; that he asked her where she intended

to have the deceased buried, and when she told him, in Saint Peter's Churchyard, at two o'clock on the next Sunday, he said "it could not be done, because he died in a state of intoxication." So that this was the reason assigned by Mr. Dodd why the body could not be interred in the Churchyard at two o'clock on the next Sunday,—“because he died in a state of intoxication.”

Now there is no evidence whatever before the Court that such was the fact; there is no plea on the part of Mr. Dodd stating this circumstance, nor any interrogatory addressed to the witnesses suggesting it; all that appears is, that Mr. Dodd stated that this person was in a state of intoxication when he died; but there is, as I said, no evidence to establish the fact, even if that could be a sufficient reason why Mr. Dodd should not perform the ceremony of burial.

The witness goes on to say, that Mr. Dodd very much persuaded her to have the deceased buried in the Cemetery, “they were not so particular there as at the Church;” and upon the witness replying that she could not say anything to it, he wished her to send her husband to him, but he was very busy that day, and she returned to Mr. Dodd and told him that “her husband wished to have his father buried at two o'clock on the following Sunday, in Saint Peter's Churchyard, as near as possible to his mother, the deceased's wife.” She says Mr. Dodd again told her it could not be done; that “he could not bury him, and he would not.” Supposing this to be a true account of what passed, there can be no doubt that this is a direct refusal by Mr. Dodd on that day to bury the corpse.

Upon the 8th article, she says she called upon Mr. Dodd again on the Sunday morning, at eight o'clock (her husband having been previously with him that morning), and told him that the corpse must be buried that day, for it was quite a nuisance in the house; that they expected him to bury it that day at two o'clock; that the deceased's relations and friends were come to the funeral, and business called them home that night; that Mr. Dodd replied, “You may go home and rest quite satisfied I will not bury him;”

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and upon the witness saying "What am I to do?" Mr. Dodd replied, "Go and do the best you can."

The evidence of John Stutes, the son-in-law, takes up the story on the Saturday evening. Mrs. Stutes had seen Mr. Dodd on the Friday, and he saw him on the Saturday, late at night. Mr. Stutes was sent for by Mr. Dodd, and upon the 7th article he says,—on the Saturday night, he called upon and saw Mr. Dodd, who, before the witness said anything, told him he could not bury his father, because "he was intoxicated, and had walked into the river." This is an additional reason assigned by Mr. Dodd, that, I presume, he had caused his own death. Of this, likewise, there is no evidence whatever. The only suggestion arises from this declaration of Mr. Dodd, upon what founded the Court is left to conjecture. Before the Coroner's Jury there was no evidence as to how the deceased came to his death, and there is no such evidence before the Court. Mr. Dodd, the witness continues, said he could not read the Burial Service over him or bury him, and he read some of the prayers of the Burial Service, saying he could not read them over the witness's father, "because he had died intoxicated." The witness says, Mr. Dodd asked him if it would cost half a sovereign to have the corpse buried at the Cemetery, and the witness replying that he had nothing to do with that, the grave was dug in the churchyard, Mr. Dodd said, "Well, he could not bury him," and advised the witness to go to the Dissenters, saying, "they are not so particular; they digged graves in the Cemetery on a Sunday, so that he might be buried there the next day, as wished." The witness then left him, and the same night went to him again and told him, provided his father could be buried at the Cemetery the next day, he should have no objection, for he was changing fast, so that nobody could bear to stop in the house with the body; if he could not, he should expect Mr. Dodd to bury him in the churchyard, at the time fixed, two o'clock in the afternoon of the next day. The witness went to Mr. Dodd the next (Sunday) morning, at about half-past eight, and told him he could not get the grave dug at the Cemetery on that day, and that the burial must take

place that day, and he should expect him to bury him in the churchyard at two o'clock that day, as was appointed. Supposing this to be true, there was an intimation given that he wished his father to be buried in the churchyard of Saint Peter's, at two o'clock on Sunday afternoon. "I told him," he adds, "that we expected to have him buried according to the forms of the Church of England; and that our friends were come from a distance to attend the funeral, and could not stop over that day."

On the 8th article, he says he told Mr. Dodd, on the occasion just deposed of, that they should be in the churchyard, with the body, at the time fixed; but Mr. Dodd repeated that he should not bury it, and he thinks it was on this occasion he said "he should not bury him then or at any other time."

On the 9th article, he deposes that the body was brought at two o'clock on Sunday to Saint Peter's Churchyard; that Mr. Dodd did not make his appearance; that the Church doors were closed, and that the body, after remaining there an hour, was taken away, and next day interred in a Cemetery. On the 10th, he says that Mr. Dodd had told him beforehand that he would not bury his father's corpse, and he was as good as his word; he did not attend. Upon the second occasion, it appears that John Stutes was accompanied by a person named Matthews, who speaks to the same effect.

Here then is evidence of notice given to Mr. Dodd, and no objection was made, it should seem, to the time fixed,—the day or the hour;—but to the interment of the body at all; the objection was, that the deceased had died in a state of intoxication, and had walked into the river; Mr. Dodd said he could not, under these circumstances, read the Burial Service over the body.

In the interrogatories administered to this witness, the suggestion is this: in answer to the 3rd interrogatory, John Stutes says that when he called, on the Saturday night, upon Mr. Dodd, this gentleman asked him whether he could, if in his place, use certain words in the Burial Service, to which he calls his attention, at the burial of his

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father, and he cannot recollect whether he did or did not answer that he could not use them. It does not appear that this in any way extenuates the offence. I suppose Mr. Dodd suggests that he considered the deceased to have been in a state of intoxication at the time of his death; but that is no reason why the Burial Service should not have been read over him by Mr. Dodd, because he believed that he was intoxicated at the time of his death, the grounds of his belief not being before the Court. The witness further says that Mr. Dodd "did then suggest that his father should be buried in the Dissenters' Cemetery, expressly by reason that, if buried there, there would be no necessity for the Service of the Burial of the Dead contained in the Book of Common Prayer precisely being read over the body." I do not conceive that this was consistent with the duty of the minister of a parish, that he should suggest that, as he could not read the Burial Service over the deceased, they should go to the burial-ground of the Dissenters, of which body the deceased was not a member, and there inter him, because, if buried there, it would be unnecessary to read the Burial Service over him: I do not think this was consistent with the duty of a minister of the Church of England. However, the witness says he did advert, in the way of objection, to the extra expense of burying him there, and Mr. Dodd did offer to relieve him therefrom at his own cost; and he did go away, leaving it in doubt as to where the body should be buried; and this was at eleven o'clock on Saturday night. On the next interrogatory, he says he returned in about an hour with Matthews, and told Mr. Dodd he agreed to his proposal of having the corpse buried in the Dissenters' Cemetery, Mr. Dodd paying the extra expense. On the following interrogatory, he says that next morning (Sunday) he again went to Mr. Dodd, and told him that the Dissenters had refused to have a grave dug on that day, and therefore he must bury the body that day at St. Peter's; that Mr. Dodd did reason with him as before, and again offer to take upon him all costs and charges of postponing the funeral, till it could take place in the Dissenters' Cemetery, and that the witness again left him,

thanking him, and "fully acceding to his proposal." It is clear that Stutes was driven to acquiesce in this proposal by the refusal of Mr. Dodd to bury his father according to the Book of Common Prayer, and to adopt a course which was contrary to the wish of himself and his family, namely, to bury him in the Dissenters' burial-ground with other forms than those of the Church of England; he was driven to adopt this suggestion of Mr. Dodd by such refusal to suffer his father's body to be interred, with the rites of the Church, in the churchyard of the parish to which he belonged. It was not a voluntary act of the son; he was forced to it by the refusal of Mr. Dodd to do what, I apprehend, it was his duty to have done, under the circumstances stated.

The son's wife has also been examined upon interrogatories, and she says Mr. Dodd did not tell her on the Sunday morning that he had arranged the whole matter with her husband:—possibly it may be so; possibly the witness may have been mistaken; but it is immaterial whether Mr. Dodd said he had arranged the matter with her husband or not. "What he said," she continues, "was, that I might go home, and rest satisfied, for that he would not bury my father-in-law, and on my further asking him what we were to do, he told me to go home and do the best we could." On the next interrogatory, she says it was at the instance and request of her husband that she went to Mr. Dodd on the Sunday morning. The husband says he did not desire her to go; that she went of her own accord. Some time had elapsed between this occurrence and the date of the examinations, owing to the delay of the proceedings occasioned by Mr. Dodd's refusal to appear, and then appearing under Protest, and therefore it is not at all improbable that the witness may have forgotten the circumstance, or the wife may have supposed that she was desired by her husband to go to Mr. Dodd.

According to the evidence of the witnesses, Mr. Dodd was applied to on Friday, Saturday, and Sunday morning, before he went to perform divine service at St. Giles's, and the time was expressly named at which the funeral was to take place, the day and the hour being fixed, and no objec-

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tion was made by him as to the time; he did not say that the day or the hour was inconvenient; it was not suggested by him that any other time would be more convenient; there is a refusal altogether to bury this person in the churchyard, but there is a suggestion by Mr. Dodd that they should bury the body in the Dissenters' burial-ground, he paying the expense. Then if the case rested here, I say no ground is alleged for refusing to bury the corpse at that time. There is no evidence whatever before the Court as to the state of the deceased when he died, whether he was in a state of intoxication or not; it is possible he may have been, but there is no evidence that he was so; that when in a state of intoxication he walked into the river; and the Coroner's Inquest had no evidence as to the manner in which he came by his death, by drowning or suffocation. I should, therefore, be of opinion, in this state of the case, that Mr. Dodd has incurred the penalty of the Canon.

But there is other evidence in the cause which goes to corroborate the case. Two persons have been examined who saw Mr. Dodd on the morning of Sunday, the 31st December; one of them, Matthews, went with a message from Stutes, the son; he saw him before the morning service at St. Giles's, and told him that Stutes had got a letter to say that his relations would be there that morning to attend the funeral; that they had done all they could to meet Mr. Dodd's wishes, in respect to having the body buried in another ground, but had failed, and there was no alternative left but that the body must be buried that day in St. Peter's Churchyard; but Mr. Dodd refused; "he said that he could not do it, and that he would not do it; that he should not suffer the body to be buried in St. Peter's Churchyard at all."

Three persons, Doughty, Ready, and Campion, saw Mr. Dodd,—and it seems that this course was taken by the advice of Mr. Cooper, the Promoter of the suit,—and they saw Mr. Dodd as he was coming out of the Church of St. Giles, after the morning service on the Sunday. It appears that there are three services at St. Giles's Church on Sundays; the morning service begins at eleven o'clock, and is

generally over about one o'clock ; and about one o'clock these three persons saw Mr. Dodd coming out of the Church, and followed him to his lodgings, and had a conversation with him on the subject of the burial of the corpse. Doughty says : " I accosted Mr. Dodd, and said to him, ' Sir, I am requested by the family of the late Wm. Stutes to acquaint you that they wish to bury him at two o'clock to-day ? ' Mr. Dodd replied, ' I shall not bury him. ' I then said to him, ' Will any other hour suit you better ? ' He replied ' No. ' I said, ' Will any other day be more convenient ? ' He replied, ' No. ' I then said to him, ' As you decline performing the duty yourself, will you allow any other gentleman to do it, at that time or any other ? ' He replied, ' Certainly not. ' I then said to him, ' Sir, I come not to ask a favour, but to demand as a right the burial of the deceased, in strict accordance with the Canons of the Church of England, of which the deceased was a member, and it is our intention to take the body at two o'clock to-day as near the church-door as we can place it. ' To that he replied, ' I will not meet you. ' I said to him again, ' Will you allow any one else ? ' He answered, ' Certainly not. ' I then said to him, ' Unless you comply with our request, I am instructed to say that immediate proceedings will be taken in the Ecclesiastical Court. ' ' I can't help it, ' he said, and upon that he went into his house. " It is said that much of this is extra-articulate ; whether it be so or not, it is unnecessary for the Court to inquire, because, in the interrogatories addressed by Mr. Dodd to this and the other witnesses, they are required to set forth all that took place on the occasion, the precise form of words in which the notice was given, who directed the witness Doughty to give such notice, and how he came to be selected. He says the family were in perplexity what to do, and he proposed to take the advice of Mr. Cooper, who, as the Coroner, he considered to be the proper person to be applied to, and, with the sanction of the family, he went to Mr. Cooper, who told him to take Campion and some third person with him, and give the notice to Mr. Dodd in their presence. The other two witnesses, Campion and Ready,

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depose precisely to the same effect, though not in the identical words.

I am of opinion that, if the first notice given to Mr. Dodd had been insufficient, subject to the same remark as in the case of *Titchmarsh v. Chapman*,* in which the Court held that the notice was not a convenient or competent notice, the intimation previously given was in this case followed up, and no objection is made by Mr. Dodd as to the hour or the day; no other objection than that the deceased was intoxicated at the time of his death, and had walked into the river; of which there is no evidence but the declaration of Mr. Dodd. There is no precise form of the notice required to be used on such an occasion; it must be a convenient or competent notice; and it is sufficient that Mr. Dodd had an intimation given to him "before,"—that is, before the body was brought to the churchyard,—of the intention to bury the body, and the day and hour. Mr. Dodd made no objection on any of the occasions that the hour was an inconvenient one; all his objection was, that he could not read the burial service over a person who had died, as this person is suggested to have died, in a state of intoxication.

The Articles
proved.

I am clearly of opinion, under the circumstances of this case, that Mr. Dodd is brought within the Canon, and that the Court must pronounce that he be suspended from his ministry for the space of three months. The Court has no discretion; if it appear that Mr. Dodd has refused to do that which it was his duty to do, the Canon leaves the Court no alternative but to pronounce a sentence of suspension from the ministry for three months. The Court would have been glad if it had had a discretion; but it has been held by this Court, and its judgment was affirmed by the Judicial Committee of the Privy Council, in the case of *Martin v. Escott*,† that no other sentence can or ought to be pronounced by this Court than that prescribed by the Canon. I therefore pronounce that Mr. Dodd is brought within the provisions of the Canon, and that he be sus-

Sentence, —
suspension for
three months.

* 1 Robert. 175. 3 Notes of Ca. 370.

† 3 Curt. 692. 4 Moo. P.C.C. 104. 1 Notes of Ca. 552.

pendent from the ministry for the space of three months; and I also condemn him in the costs of the suit.

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Proctors:—*Brickwood*, for the Promoter; *Bathurst*, for the party proceeded against.

FRANKFORT v. FRANKFORT.—*Motion.*—This was originally a cause of separation by reason of adultery, promoted by Viscountess Frankfort against Viscount Frankfort, her husband, in the Consistory Court of London, which pronounced for the separation, and decreed £800 a year permanent alimony. This allotment of alimony was, on appeal,* affirmed by this Court. The alimony was paid up to the 11th January, 1849, since which time only £125 had been paid. In consequence, a Monition issued under seal of this Court for the amount (£675) due to the 11th January, 1850, monishing Lord Frankfort to pay the same within fifteen days, which was served upon Lord Frankfort, and returned on the 19th March last; but the alimony remained unpaid.

Alimony.—The husband pronounced in contempt for non-obedience to a Monition for payment of alimony.

Sir J. Dodson, Q.A., for Lady Frankfort, moved the Court to pronounce Lord Frankfort in contempt for not obeying the Monition.

Dr. Harding appeared for Lord Frankfort, who, in an affidavit, stated that Lady Frankfort had received a considerable accession of fortune, in consequence of the death of her father in January, 1849.

SIR H. JENNER FUST.

JUDGMENT.

The reduction of alimony in future is another matter; the question now is, why he has not paid the money already due.

I am clearly of opinion that the Court has no option; that it is bound to enforce the payment of this money *ex debito justitiæ*. A Decree was made by the Court that Lady Frankfort should receive £800 a year, and there was no appeal from that Decree. Is the Court in a situation to say,

* 3 Notes of Ca. 68.

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—
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Frankfort.

The husband
 pronounced in
 contempt.

upon the statements contained in two affidavits, one by Lord Frankfort and the other by Lady Frankfort, that Lord Frankfort is entitled to a reduction of the alimony? I am clearly of opinion that it is not, and that it is bound to enforce the payment of the alimony already due, by pronouncing Lord Frankfort in contempt for not obeying the Monition issued by this Court; and directing his contempt to be signified. If the money be not paid within ten days, I shall direct the *Significavit* to issue. I pronounce Lord Frankfort in contempt, for not obeying the Monition for the payment of the alimony up to January, 1850, and I must also condemn him in the costs.

Proctors:—*F. Dyke*, for Lady Frankfort; *Middleton*, for Lord Frankfort.

High Court of Admiralty.

Add. Court Day.

APRIL 24.

Salvage. — **THE "FLEECE" (ANDERSON).**—*Cause, by Act on Petition.*—This was a suit against the ship and cargo, by the masters, owners, and crews of four smacks, and by the commander, officers, and crew of H.M.'s Revenue Cutter *Scout*, to recover a salvage for services rendered to the brig *Fleece*, bound to London, with hemp and tallow, when on the Gunfleet Sand, on the 7th October.

The Act on Petition alleged that the services of the salvors had been accepted by the master of the brig, which, when got off the sand, made water so fast that she was run on shore at the Maze, off the coast of Essex, and whilst the salvors were in charge of the brig, which they had left for the night, they found, on the morning of the 9th, that a large number of men had taken forcible possession of her, who, though warned that the salvors were in charge, and

Where salvors legally in possession of a vessel were forcibly dispossessed by "wreckers," who took out cargo, the original salvors held to be entitled to salvage on the whole property.—Where salvors are on board a ship in distress, their services having been accepted, and before they have done anything towards

in spite of endeavours to prevent them, got out some of the cargo, cut away the standing rigging, took away the bower anchors, using violent and threatening language, and then left the brig, which, in consequence of bad weather, in spite of the exertions of the salvors, on the 12th, became a total wreck, and was sold by order of the owners; and that the cargo actually salvaged by the salvors consisted of 42 casks and 28 bags of tallow, and 18,547 heads of hemp.

The Answer of the owners denied that more of the cargo than 3 casks and about 84 cwt. of tallow was salvaged by the salvors, alleging that the residue (some portions of which had been since recovered) was taken forcible possession of by a gang of "wreckers," twenty-seven of whom had been prosecuted to conviction and fined.

Sir J. Dodson, Q.A., and Dr. Haggard, for the salvors; Dr. Addams and Dr. Twiss, for the owners.

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salvaging the property, they are dispossessed by any persons, who in any manner salvage the property, the latter can earn nothing for their own benefit, but every service performed by them must inure to the benefit of the original salvors.

DR. LUSHINGTON.

JUDGMENT.

The property, according to the account-sales of tallow and hemp, is £1,188, from which various deductions are to be made. With regard to the freight claimed by the owners, amounting to £229, it is said that ought not to form a deduction. It is clear that salvors, generally speaking, are entitled to salvage upon cargo, freight, and ship; but if no demand is made for salvage upon the freight, then the freight is not a proper deduction from the value of the cargo, for this obvious reason, that, supposing the owners of the cargo are compelled to pay this £229, on account of freight, to the owners of the ship, then they will have to pay so much less of the proportion of salvage. It comes to the same thing, whether you take salvage from the freight itself, or from the cargo as it is sold, which includes, of course, the value of the freight. I am, therefore, of opinion that the sum of £229 cannot be deducted. The same observation applies to the insurance; so that the whole value of the cargo on which salvage is claimed is about £990.

It appears that the salvors (whose merits are not denied) came to the rescue of this ship early in the morning of the 7th October, and that they continued to perform services

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Flores.

The principle.

for a considerable length of time; for I find that the forcible possession of this vessel took place on the 9th, when the parties,—the “wreckers,” as they are termed in the proceedings,—in fact, dispossessed the salvors, and prevented them from resorting to the means they had intended to adopt for salving the ship and cargo. In some way or other,—for it is not clearly stated in the proceedings, — these people, “wreckers” or not,—did get part of the cargo out of the vessel, but portions of it came into the possession of the owners, who are to that extent benefited by their act. The question is, whether any salvage is due on the property so salvaged, and, if so, to whom it is due? It could not be contended, that persons unlawfully and by force dispossessing salvors of a vessel and cargo in their care and charge could earn anything by such conduct. It is clear that they have no *persona standi* here, and that any demand made by them would be rejected with costs. But are the original salvors entitled to that benefit to which they would have been entitled had there been no misconduct on the part of other individuals? In the case of the “*Blendon Hall*,”* a principle was laid down by Lord Stowell, to which I entirely accede, and on which I intend always to act; namely, that where a vessel was in the possession of competent salvors, and they were improperly dispossessed by any other set of persons, even by one of her Majesty’s vessels, claiming to be salvors, the benefit of the whole service must go to the original salvors. If that is the principle, is there any substantial distinction between that case and the present? The *Blendon Hall* was a derelict, in the possession of certain salvors. Whilst they were proceeding to rescue the vessel from peril, they were dispossessed by one of his Majesty’s vessels. The salvage service had not been completed, but was in course of completion. I am of opinion that it matters not at what period the salvors are dispossessed. I go the whole length of laying down this principle, that where salvors are on board a ship in distress, their services having been accepted by the master, and they are about to com-

* 1 Dods. 414.

mence measures for salving the vessel, and before they have done one stroke of the work, they are dispossessed by any persons, who in any manner save the ship and cargo, or part of the cargo, this alleged second set of salvors can earn nothing for their own benefit, but every act done and every service performed by them must inure to the benefit of the original salvors. I lay that down as an universal principle, from which the Court can never depart. It appears to me quite clear, that if a man is unlawfully dispossessed of that of which he is lawfully in possession, whatever advantage may legally accrue must in justice inure to him who did the legal act, and to no one else. A man undertakes to perform a service which it is his proper business or right to perform: can it be contended that those for whom the services have been performed are to pay nothing? The consequence would then be, that neither the original salvors nor those who supplanted them would take anything. I am, therefore, clearly of opinion that the original salvors in this case are entitled to claim salvage on the whole of the property salvaged; the only question is, to what extent I ought to go under the circumstances of the case.

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Fleeca.

The original
salvors entitled
to claim on
the whole pro-
perty.

It appears that there has been a prosecution, which has been successful, against the "wreckers" who took forcible possession of the ship and cargo. With respect to the expenses of that prosecution, I am clearly of opinion that it can form no item of deduction in this case. It is a public duty to prosecute where an offence of this kind has been committed, and can form no ground why a service of this kind should receive a less adequate reward. I regret to find that the "wreckers" were simply fined. The impression on my mind is, that a communication ought to have been made to the Lords Commissioners of the Admiralty, who would have directed the prosecution to have been conducted by their officers, and then I hope something more than a fine would have been inflicted upon parties guilty of such lawless conduct; and if such a case should occur again, that is the course I shall pursue, and I am satisfied that if a communication be made to the Lords of the Admiralty, they will not be slack in carrying on the prosecution.

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I am of opinion that this is a very meritorious service, and not the less so because Lieutenant Saxby and the persons on board the smacks abstained from acts of violence, though they would have been justified in retaining possession at whatever risk. They acted, however, most laudably in abstaining from so doing; because, if they had not abstained, in all probability an affray would have taken place, and there would have been bloodshed. Looking at the danger the property was in, and the nature of the service, I shall give £300.

Proctors:—*Deacon*, for the salvors; *F. Clarkson*, for the owners.

2nd Sess.

APRIL 25.

Collision between two sailing - vessels: the defence set up by the vessel proceeded against, namely, that it was occasioned by inevitable accident,—not sustained.

THE "BENARES" (BROWN).—*Cause, by Act on Petition.*
—This was an action by the owner of part of the cargo on board the barque *Royal Archer*, against the barque *Benares*, to recover their loss in consequence of a collision between the vessels. Four actions were in fact entered against the ship and freight on behalf of different owners of the cargo, and for the crew of the *Royal Archer* for their private effects. The pleadings were concluded on the 8th of April, and it was not until the 15th of April that an action was entered on behalf of the owners of the *Royal Archer*, and of owners and shippers of other parts of the cargo.

The facts were these: The *Royal Archer*, of 310 tons, bound from London to Port Adelaide, with general merchandise, at half-past 3 A.M., on the 19th of December, was in lat. 6° 7' N., and long. 19° 42' 30" W., close-hauled on the larboard tack, steering S.S.W., the wind blowing from the S.E., when she saw the *Benares* distant about a mile ahead, a little on the weather bow, standing to the N., with all sails set, and running free. According to the *Royal Archer*, she kept her course for two minutes; but, seeing the *Benares* coming stem on, she put up her helm, let go the mizen sheet, paid off rapidly, and would have gone to the leeward of the *Benares* if the latter had kept her course; instead of which,

however, she also put up her helm and paid off; in consequence of which, the vessels, in a few minutes, came into collision, and the *Royal Archer* shortly afterwards sank. According to the *Benares*, a barque of 524 tons, proceeding from Calcutta to Liverpool, she did not, from the state of the weather, see the *Royal Archer* until within two or three ship's lengths of her, and she was then directly ahead, on the starboard tack. Orders were immediately given to put the helm "hard up;" but before the *Benares* had time to pay off more than a point and a half, the *Royal Archer* came into collision with her, doing her considerable damage. The *Benares* alleged that the *Royal Archer* did not show a light, and keep as close-hauled as she ought to have done; but her principal defence was, inevitable accident. The cargo lost, independently of the ship, was valued at £30,000.

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Benares.

The Court was assisted by two Elder Brethren of the Trinity House.*

Dr. Addams and *Dr. Bayford*, for the parties proceeding;
Dr. Robinson and *Dr. Twiss*, for the *Benares*.

DR. LUSHINGTON (*addressing the Elder Brethren*):—

SUMMING UP.

Gentlemen,—The amount of property destroyed on the present unfortunate occasion is great, and it is probable that there being so large a property at stake has led to the length of these proceedings, into which I think it will not be necessary to enter minutely, because, according to my conception of them, there is matter introduced, to a very considerable extent, upon which it will be utterly impossible for you safely to rely. I allude to the transactions which took place after the collision—to the alleged conversations and the asserted admissions which are said to have occurred at different times during the six weeks or two months subsequent to the collision. There are several reasons why I do not trouble you with this part of the case. There is one, which is rather a matter of law than a point for your consideration. I doubt exceedingly whether the

* Captain Hayman and Captain Gordon.

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Benares.

declaration of any common seaman ought to be received as evidence against the owners of the ship, and I am satisfied that to take loose conversations as evidence would lead to no available purpose. It is unnecessary, therefore, to trouble you with any comments on this part of the case. I have had occasion to observe before, that when matters of this kind are introduced, it is only accumulating a quantity of paper—it does not assist us in coming to any conclusion.

The facts.

The facts of the case, so far as it is necessary to trouble you with them, appear to be these. The vessel proceeding, the *Royal Archer*, was bound from London to Port Adelaide. The collision occurred on the open ocean, at a considerable distance from England. The wind is admitted to have been S.E.; the course of the *Royal Archer* was S.S.W., that of the *Benares* N.W. to N.W. and by W. The *Royal Archer*, therefore, must have been on the larboard, and the *Benares* on the starboard tack. In the course of that night, Morrison, the first mate of the *Royal Archer*, had the watch; there was a man on the look-out, and Patterson was at the helm, when a vessel was seen directly approaching the *Royal Archer*. Some little interval occurred before any measures were taken; but as soon as Morrison had ascertained to his satisfaction that she was approaching in a direct line, he ordered the helm to be ported, which was done, and he himself let go the mizen sheet.

With regard to the *Benares*, it appears that Walker, the second mate, was on her deck; that Monro was at the helm, and Mills ought to have been the look-out man, but a great deal of dispute has arisen as to whether he was really on the look-out or not. The defence in the original proceedings on the part of the *Benares* is to the following effect: that, in consequence of the weather, it was impossible for them to perceive the *Royal Archer* sooner than they did; that a good look-out was kept, the best that could be, under the circumstances. They say nothing as to the reason why they starboarded their helm, but they charge this collision upon the *Royal Archer*, in these words:—that if the *Royal Archer* had shown a light when she first saw the *Benares*, and had kept her course by the wind, which it was her

duty to have done, the collision would certainly have been avoided, for the look-out man might have been able to see a light sooner than the vessel herself.

These are the facts of the case, and I am not going to trouble you with any discussion of the conflicting evidence as to where Mills was at the time in question, and for a reason which will appear presently sufficiently obvious. It is very true (and I think it right to make the observation), that whenever I see one of the crew of a vessel, defendant in the cause, produced in support of the case of the opponent, I look at his evidence with some degree of suspicion. I am not justified in disregarding it altogether—I am bound to look at the *res gesta*; but there is generally such a disposition to adhere to the vessel to which a man belongs, that it is improbable that he would voluntarily come forward to give evidence against his own ship, unless there had been some strong means employed to induce him so to do; and you will recollect that, in this form of proceeding, all these affidavits are voluntarily made; whereas, when the proceedings are by plea and proof, a witness can be compelled to be examined.

I will now suggest certain questions to you as to the conduct of these two ships. First, with regard to the *Benares*, —was there, or was there not, according to your judgment on the evidence, a good look-out? It is said that the weather was so bad it was impossible, with any care and caution that could have been used, to have seen the *Royal Archer* at any distance, so as to have time to consider what measures were fit to be adopted. But was the weather really so very dark and gloomy as to justify this assertion made on the part of the *Benares*? You cannot believe that the weather was so dark and gloomy as to prevent one vessel from being seen from the other, unless you should come to the conclusion that the whole of the story on the part of the *Royal Archer* is false and fictitious; because she states that she saw the *Benares* seven or eight minutes before the collision. If that be a fact,—which I see no reason to doubt,—was there any reason why, if there had been a look-out on the part of the *Benares*, she should not have seen the *Royal*

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Benares.

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Archer about the same time? I have been considering whether from the quarter from which the wind blew, or any other cause, there was a probability of the *Royal Archer* discovering the *Benares* at a period much earlier than the *Benares* could perceive the *Royal Archer*; but such a cause does not occur to me, though it may to you. That is the first point; but here comes a second, of which I have heard much less than I expected to hear. It is admitted that the helm of the *Benares* was starboarded as soon as the *Royal Archer* was discovered. Was that right or wrong? If it was a wrong measure to adopt, then it does not signify what the look-out was. So much for the *Benares*.

With respect to the *Royal Archer*, the case stands thus: the fault alleged against her, as I have already stated, is, that she should have shown a light. I have naturally looked to see whether the *Benares* showed a light, and I do not find that she did. I do not know that it was more incumbent on the one vessel to exhibit a light than on the other. But you will recollect, with regard to showing lights, that, generally speaking, in the open sea, there is no general obligation to show a light, though under peculiar circumstances it may be obligatory; but, generally speaking, in the open sea, it is not incumbent upon a merchant-vessel to show a light. It is further said that the *Royal Archer* was wrong in porting her helm,—that if she had kept her course, the collision would have been avoided. You will say whether she was wrong in porting or not. The Counsel for the *Benares* very ingeniously turn the tables, and say that the *Royal Archer* was first wrong in porting her helm; and, secondly, in not porting it sooner. These are the points on which I request your attention. You will have the kindness to tell me your opinion as to the conduct of the two vessels.

OPINION.

CAPTAIN HAYMAN.—My brother and myself are decidedly of opinion that the *Benares* was wrong. In the first instance, on seeing the *Royal Archer*, it was her duty, instead of putting her helm up, to have put it to port. We think that if, after she saw the other vessel, she had ported,

she would have gone quite clear. It has been laid down that, this ship coming before the wind, it was her duty immediately to have ported her helm, not to have starboarded it. The other ship being on a wind, on the port tack, it was her duty to have borne up as soon as she could discover which way the other vessel was going. We do not consider that any blame is attached to the *Royal Archer*, because, as soon as she saw the *Benares* approaching her at a rapid rate, she immediately put her helm up, and eased off the mizen sheet. We consider that all the blame must be attributed to the *Benares*.

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Benares.The *Benares*
to blame.

PER CURIAM.—I pronounce for the damage.

JUDGMENT.

Proctors:—*Rothery*, for the *Royal Archer*; *Tabbs*, for the *Benares*.

Prerogative Court of Canterbury.

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2nd Sess.

IN THE GOODS OF SARAH WHITE, WIDOW, DEC.—
Motion, ex-parte.—The deceased died in March last, leaving a will written on a sheet of foolscap paper, the dispositive part being contained in the first and second sides; the latter includes part of the *testimonium*-clause, “In witness whereof, I have hereunto set,”—the writing here reaches the bottom of the second side, and is continued at the top of the third side,—“my hand this seventh day of January, in the year of our Lord one thousand eight hundred and fifty.” Then, with a blank interval of about an inch, follows the attestation-clause, and, another blank space of about an inch intervening, there appear the mark of the deceased, and the subscriptions of the witnesses, thus:—

Signature of the deceased held to be at the foot or end of the will.—Where the signature is on the same side of the paper as the conclusion of the will, generally speaking, it would be a due execution.

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White, dec.

Signed and delivered by the said Sarah White, as and for her last will and testament, in the presence of us, who in her presence and in the presence of each other have hereunto set our hands as witnesses attesting her execution thereof.

[Blank space.]

The mark + of Sarah White.

Thomas James

James Simmons.

DECREE.

SIR H. JENNER FUST.

The question is, whether this will is signed at the foot or end. The Court has already said, that it cannot extract from the decision of the Judicial Committee of the Privy Council, in the case of *Smee v. Bryer*,* any general rule that it can lay down as a guide in all these cases; but I am inclined to think that it is not an unreasonable distinction, that, where the signature of the deceased is on the same side with the conclusion of the will,—because I take this *testimonium*-clause to be the real conclusion, though there may be some exceptions, in which the attestation-clause may be the conclusion of the will,—that, where the name of the deceased is on that side of the paper upon which the will concludes,—where there are some parts of the will immediately above the testator's signature (though some space intervenes),—that is a reasonable compliance with the terms of the Act of Parliament, and in such cases the Court would be inclined to hold that it was a signature at the foot or end of the will. The Court cannot lay down any specific rule as to what is the conclusion of a will—in some cases the *testimonium*-clause is the conclusion of the will, in other cases the attestation-clause may conclude the will; though the signature of the testator ought to be at the end of the *testimonium*-clause.

A due execution.

Under the circumstances of this case, I am of opinion that this is a due execution of the will, notwithstanding

* 6 Notes of Ca. Supp. xli.

there is a considerable space between the *testimonium* and the attestation clauses, and notwithstanding that the mark of the deceased is considerably below the attestation-clause. Part of the will (that is, the *testimonium*-clause) is contained on the third side of the will, where there is the signature of the deceased. In *Smee v. Bryer*, there was no part of the will immediately above the signature of the deceased. Decree probate to pass. Where the signature of the deceased is on the same side as the conclusion of the will, generally speaking, it would be a due execution of the will.

APRIL 26.

*White, dec.**Tebbs, Proctor.*

IN THE GOODS OF THE REV. GEORGE HAMBLY ROWE, Signature of the deceased not at the foot or end of the will. — Where the will is signed on a different side of the paper from that on which the will concludes, it is not a due execution.
 DEC.—*Motion, ex-parte.*—The deceased died 4th March last, leaving a will which was written on two sides of a sheet of letter-paper. The disposition was arranged in paragraphs, numbered 1 to 6; the sixth, containing the appointment of executors, and ending, “dated this twenty-third day of April, one thousand eight hundred and forty-nine,” concluded at the bottom of the second side. On the top of the third side appeared the attestation and signatures, thus:—

Signed, sealed, and delivered
 in the presence of
 Mary Rowe
 Emily Spittle


 Seal.

George Hambly Rowe.

SIR H. JENNER FUST.

DECREE.

What do these persons attest? The signature is on the third side of the paper, above which there is no part of the will. I must lay down some rule to place these cases on the same footing. What is the real distinction between this case and *Mr. Shadwell's Case*?* There are two sides of a sheet of letter-paper on which the dispositive

* *Antea*, p. 377.

APRIL 26.

Rowe, dec.

part of the will is written, ending, "one thousand eight hundred and forty-nine," and a blank is left in which the deceased might have signed his name, for there is room enough for that. [*Dr. Jenner.*—That would be at the foot; but the Act says "foot or end."] I am now inclined to hold that "foot" and "end" must be synonymous. There is room, I say, for the signature of the deceased on the second side,—not ample, indeed, but room enough for him to have signed. On the third side, at the top, is "signed, sealed, and delivered in the presence of," and then follow the names of the witnesses, and opposite to this there is a seal, and the name of the deceased is under the seal, which is not at the top of that side of the paper. The witnesses attested the signature of the deceased, but nothing else. To what did they sign their names? To a sheet of paper, which might have contained nothing at all besides. Generally speaking, where the signature of the deceased is on the same side as the conclusion of the will, it would be a due execution, notwithstanding there may be some space between the conclusion of the will and the signature of the deceased, because there would be a part of the will above the signature. I am at a loss to see any distinction between this case and that of *Shadwell*, where there was ample room for the signature of the deceased. The rule which the Court has laid down is, that where the will is signed on a different side of the paper from that on which the will concludes, it is not a due execution of the will. If a will concludes at the very bottom of one side, and the signature of the deceased is quite at the top of the next side, it might be an exception to the rule. I reject this Motion.

Motion
rejected.

Jennings, Proctor.

Signature held
to be not at the
foot or end of
the will.

IN THE GOODS OF STEPHEN CURTIS, DEC.—*Motion, ex-parte.*—The deceased died 3rd April, 1850, leaving a will written upon the first side of a sheet of foolscap paper, the date reaching to within half an inch of the bottom of that side. On the second side appeared the attestation—

clause and the signatures of the deceased and the witnesses, thus:—

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Curtis, dec.

Signed, sealed, and declared
by the said Stephen Curtis, as
and for his last will and tes-
tament, in the presence of us,
who at his request have sub-
scribed our names as witnesses
thereto.

Stephen Curtis

Seal.

Mary Glasscock
Benjamin Hickman.

SIR H. JENNER FUST.

DECREE.

This is not so strong a case as the preceding. The will is written on one side of a sheet of foolscap paper, and it concludes: "I do hereby declare this my last will and testament; in witness whereof, I, the said Stephen Curtis, have hereunto set my seal and hand this 27th day of October, 1846." There the will ends, and there is a space, affording ample room for the deceased to have signed his name; but there is no signature on that side. Then there is an attestation-clause on the next side, opposite to which is the signature of the deceased. So that it is not so favourable a case as the other, and I reject the Motion.

Motion
rejected.

Roberts, Proctor.

IN THE GOODS OF SUSANNAH HESTER, SPINSTER, DEC. Signature held
—Motion, *ex-parte*.—The deceased died on the 26th March, to be at the
1850, leaving a will, dated 30th January, 1845, which was the will.
written on the first side of a sheet of foolscap paper, of large
size. At the foot, on the left-hand side, was the attestation-
clause, immediately below which was the name of one of
the witnesses, there being a blank interval of about half an
inch between it and the name of the other witness. On a
line with the latter, on the right-hand side, was the signa-
ture of the deceased, ending just below a small seal.

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SIR H. JENNER FUST.

Hester, dec.

DECREE.

There is space, certainly, between the will and the seal in which the deceased might have signed her name; but her signature is on the same side as the will, and at the bottom of the page, so that not merely a part, but the whole of the will is above her name; and although she might have signed immediately under the attestation-clause, yet the Court must adopt the same rule in this as in other cases, where the signature of the deceased was below the attestation-clause, and there was some space between, and consider this a due execution of the will, as being signed at the foot or end. Whether "foot" and "end" be synonymous or not, there may be some doubt; I am inclined to hold that they are synonymous, though the Court, at an earlier stage of these cases, thought there might be some distinction. I decree probate of this paper to pass.

Probate
decreed.

Nelson, Proctor.

Signature held
not to be at the
foot or end of
the will.

IN THE GOODS OF CHARLOTTE WRIGHTSON, WIDOW, DEC.
—*Motion, ex-parte.*—The deceased died 25th March, 1850, having made her will, dated 22nd August, 1844, which is written on two sides of a sheet of foolscap paper, ending, with the *testimonium*-clause and date, at the bottom of the second side, leaving no more space there (about a quarter of an inch) than on the first side. At the top of the third side appear the attestation-clause and signatures, thus:—

Signed by the said Charlotte Wrightson, the testatrix, by her mark, and by her sealed, published, and declared, as for her last will and testament, the same being first read over and explained to and fully understood by her, in the presence of us, who, at her request, and in her presence, and in the presence of each other, have hereunto subscribed our names as witnesses.

The mark of

+

Seal.

Charlotte Wrightson.

A. P. K.

C. T. Y.

SIR H. JENNER FUST.

In this case the circumstances are strong, if I could make a distinction ; but I cannot make a distinction ; I must adhere to the rule. If I were to relax it in this case, I must do so in others. I reject the Motion on the same principle as in the other cases.

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Wrightson, dec.

Motion
rejected.

Slade, Proctor.

IN THE GOODS OF CHARLES HOLLAND, DEC.—*Motion*, Signature held *ex-parte*.—The deceased died 5th December, 1849, having made his will, dated 26th March, 1849, bequeathing the bulk of his property to his widow, whom he appointed sole executrix. The will, which is in his own handwriting, is in paragraphs, contained in the first and second sides of a sheet of foolscap paper, with a margin, three-quarters of an inch wide, on each side of the writing, and a blank space of about double the width of either margin is left at the top and at the bottom of the first side, a corresponding blank being also left at the top of the second side, on which side two paragraphs of the will are written. After the last paragraph, which concludes with the *testimonium*-clause and date, a space of about an inch intervenes before the commencement of the attestation-clause, which is written over about two-thirds of the width of the space between the two margins, and is embraced by a circumflex, in the centre of which, on the right hand, the signature of the deceased is placed, the names of the attesting witnesses,—a solicitor and his clerk,—being subscribed below the attestation-clause.

DECREE.

SIR H. JENNER FUST.

Here the name of the deceased is on the same side as the will ; a considerable part of the will is above the signature : therefore, so far the case of *Smee v. Bryer* will not apply to this case, because there is a part of the will above the signature of the deceased. I am of opinion that this is a compliance with the Act. Decree probate of the paper.

Probate
decreed.

Prichard, Proctor.

APRIL 26.

Signature held
not to be at the
foot or end of
the will.

IN THE GOODS OF GEORGE FROGGARTT, DEC.—*Motion, ex-parte*.—The deceased died 23rd February, 1850, having made a will, therein naming his wife sole executrix and universal legatee. The will is written on the first side of a sheet of foolscap paper. Between the last line and the lower edge of the paper is a blank space of about an inch. There is no writing on the second side, but on the upper part of the third side is a very full and special attestation-clause, concluding, "he being unwell, but of sound mind, the same has been read over and explained to him, and he appeared perfectly to understand the same," which is written on the whole width of the page. At the conclusion of this clause, on the right hand, appears the signature of the deceased, and on the left hand, under the word "witnessed," are the subscriptions of the witnesses.

DECREE.

SIR H. JENNER FUST.

I am clearly of opinion that this case is not fairly distinguishable from the other cases, particularly that of *Wrightson*, just moved. I am clearly of opinion that this will is not signed at the foot or end; there is room for the deceased to have signed his name below the conclusion of the will, on the first side. The words, "he being unwell," &c., are clearly part of the attestation-clause, under the circumstances in which the will was written. I reject the Motion.

Motion
rejected.

Thomas, Proctor.

The same.

IN THE GOODS OF SARAH SUSANNAH HOWELL, WIDOW, DEC.—*Motion, ex-parte*.—The deceased died 27th March, 1850, leaving a will, in her own handwriting, dated at the end, 10th July, 1844. This will, which exhibits several obliterations and interlineations, is written on three sides of a sheet of foolscap paper. It begins, "I, S. S. H., &c., do this 12th day of February, 1840, will and bequeath," &c. On the third side, about one-third down,—after the words "and I also nominate, constitute, and appoint my much-esteemed friend, J. R., as above, to be my other exe-

cutor, to assist in carrying this my last will and testament into effect,"—there is a blank space of about three inches, and then follows, "This my last will and testament is now signed by me, Sarah Susannah Howell, on this 10th day of July, 1844." At the end of this is the signature of the deceased, "Sarah Howell," and on the left-hand side are the attestation-clause and the names of the witnesses. Over the blank space so left in the will is a paper, in the deceased's writing, attached to it, by two seals, on one side only,—so as to show that the space underneath is blank,—headed "Codicil to my last will," revoking the appointment of one executor, and substituting another person in his stead, and bearing date 27th November, 1849; this paper is signed by the deceased, but is unattested. The witnesses were unable to depose to the state of the paper when they attested, by reason that the deceased produced the paper to them in such a manner that they saw only the concluding words. The alterations made in the body of the will furnished internal evidence that two of them were made a considerable time after the execution. The will and codicil were found folded up with two slight testamentary memoranda, of no moment, unattested, in a sheet of foolscap paper, unsecured.

APRIL 26.

Howell, dec.

SIR H. JENNER FUST.

DECEASED.

It is true that the name of the deceased is signed on the same side as that on which the will concludes; but the Court guarded itself against being supposed to lay down, as a universal principle, that in all cases, and under all circumstances, this would be a due execution within the Act. Here is a space left apparently without any purpose; but when I see that the will was begun in 1840, and observe the alterations she made in it, I am of opinion that it was not a final conclusion of the will; that she did not consider she had bound herself not to add anything to it. I am of opinion, under the circumstances, that this case does not fall within the principle laid down to-day, that where the signature is on the same side as the will it is, generally speaking, a compliance with the Act; I am of opinion that the deceased reserved to herself the option of adding to the will.

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*Howell, dec*Motion
rejected.

I reject the Motion, and leave the parties to propound the paper. It is one of those cases which are exceptions to the rule which the Court has laid down in respect to these cases. The paper purporting to be a codicil, not being attested, can have no effect whatever.

Pritchard, Proctor.

Signature held
to be at the
foot or end of
the will.

IN THE GOODS OF ELIZA CUPPAGE, SPINSTER, DEC.—
Motion, ex-parte.—The deceased died 12th March, 1850, leaving a will, dated 22nd January, 1848, which is written on two sides of a sheet of foolscap paper, the deceased's signature being placed under the attestation-clause, which immediately follows the dispositive part of the will, thus:—

Signed, sealed, published, and declared by the said testator [*sic*], as and for her last will and testament, in the presence of us, who, in her presence, at her request, and in the presence of each other, have hereunto subscribed our names as witnesses.

R. L.

Seal.

Eliza Cuppage.

Seal.

J. S.

Seal.

DECREE.

SIR H. JENNER FUST.

I am quite clear that this case is within the rule which the Court has laid down. The attestation-clause follows so closely the dispositive part of the will, that it may be considered a part of the will. Decree administration with the will annexed to the residuary legatee.*

Motion
granted.

Jennings, Proctor.

* It may be proper to append to this series of decisions,—grouped together by the Court with the view of extracting therefrom a general rule,—a decision which, in principle, appears to conflict with them, in the Consistory Court of London, on the Bye-Day in Trinity Term:—

July 5.

Re Goldie.

IN THE GOODS OF CHARLOTTE JANE GOLDIE, DEC.—*Motion, ex-parte.*—The deceased, a domiciled English subject, died in France 18th June, 1850, leaving a will, dated 5th March, 1850, written, in the English form, upon a sheet of foreign paper, the dispositive part ending,
with

IN THE GOODS OF CHARLES DAY, DEC.—*Motion, ex-* **APRIL 26.**
parte.—The testator in this case, who died on the 31st July,

1849, possessed of considerable property, real and personal, having named left a will and three codicils. By the following clause in a party (M. M.) the will, he appointed M. M. sole executor during life, and trustee of sole executor and after his death, or, in certain contingencies, his (the his will during testator's) two sons, C. A. D., and M. S. A. D., were named his death, or if executors:— he should decline to prove,

Also I make, nominate, and appoint my friend, M. M., of, &c., or be incapable executor and trustee of this my will, during the term of his natural of proving, the life, and from and immediately after his decease, I make, nominate, should not and appoint my sons, C. A. D., and M. S. A. D., to be executors prove it within and trustees of this my will; but I hereby expressly direct that my three months, appointment of the said C. A. D. as an executor of this my will then substituting other exe- shall not in any way exonerate or excuse him or his co-partners cutors and trustees, and M. M., in trade from the payment of the amount due to me upon a cer- through the in- tain bond for £4,000 and interest, or from the deduction of £1,000 advertence of from his share of property bequeathed to him as hereinafter men- the solicitor, tioned: Provided always, that, in case the said M. M. shall here- not having after decline or be incapable to prove this my will, and to act in proved the will the execution thereof, or of the trusts thereof, and shall not prove within three months, though the same for the period of three calendar months next after my he had acted in execution of the decease, then I do hereby declare that the several devises and trusts of the bequests and trusts therein contained shall immediately take effect will:— Held, as to my other executors and trustees, in the same manner as if that M. M.'s the said M. M. had departed this life. appointment was void.

Immediately after the deceased's death, M. M. expressed his willingness to act as executor in execution of the trusts

with the date "1850," on the first side, within nine-tenths of an inch of the edge of the paper. At the top of the second side, on the left hand, is a formal attestation-clause, opposite to which, underneath a small seal, placed a little below the first line of the attestation-clause, is the signature of the deceased, and under her signature are the subscriptions of the witnesses (foreigners). No part of the disposition is above the signature, and the case seems not essentially distinguishable from the cases of *Rowe*, of *Curtis*, and of *Wrightson*.

The Motion was for probate of the paper as duly executed.

DA. LUSHINGTON.

DECREES.

No doubt it is well executed. It is close to the bottom.

Decrees probate.

Cwrey, Proctor,

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APRIL 26.

Day, dec.

of the will, and proceeded to intermeddle in the testator's affairs, and to give various directions, as executor, with regard to the collection and management of the property, and he instructed his (and the testator's) solicitor, to whom he delivered the will and codicils, to take the requisite steps to obtain probate thereof; but the said solicitor, though he had prepared the will, had completely lost sight of the limitation, and conceiving it desirable to procure accurate information of the particulars of the testator's estate and effects, and collect a portion thereof, delayed applying for a Commission to swear M. M. as executor until shortly before the 22nd February, 1850, when he was duly sworn as such under a Commission from this Court. The Messrs. Day, substituted executors, on the death or forfeiture of M. M., consented by proxy to probate being granted to him, notwithstanding he had not proved the will and codicils within three months from the death of the testator.

MOTION.

Dr. Harding moved for probate to M. M., as sole executor for life.

DECREE.

SIR H. JENNER FUST.

The Court has no doubt that the deceased meant and intended that M. M. should act as his executor; but he has expressed his intention in terms somewhat ambiguous, and circumstances appear to have defeated that intention. The Messrs. Day are appointed executors and trustees after the death of M. M.; and there is a proviso that, in case he shall decline, or be incapable, to prove the will and to act in execution thereof, and shall not prove the same within three calendar months after the testator's death, then the testator declares "that the several devises and bequests and trusts therein contained shall immediately take effect as to my other executors and trustees, in the same manner as if the said M. M. had departed this life." So that, in the event of M. M. declining to act,—which he has not done, as it appears from the affidavit of Mr. Newman, the solicitor, that M. M. has acted in the trusts of the will;—or of his being incapable,—which is not proved to be the case;—or of his not proving the will for three calendar

months next after the testator's decease, the Messrs. Day are to be substituted as executors and trustees. M. M. has not declined, and is not incapable, but he has not proved the will within three months, and the question is, whether the word "and," in construction, is to be considered as disjunctive or conjunctive,—whether "and" is the same as "or." I am afraid that the condition of proving the will within three months is a condition that must be fulfilled, and, not having been fulfilled, the appointment over to the sons, as in case of M. M.'s death, must take effect. I am afraid that by the word "and" the condition of proving the will within three months is conjoined to the other conditions, and that the Court can put no other construction upon this clause of the will than that M. M.'s appointment is conditional upon his proving the will within three months; and this not having been done, though proceeding from the inadvertence of the solicitor and of M. M. himself, probate must be decreed to the executors substituted on the failure of M. M. to fulfil the condition of proving the will within three months after the death of the testator. I reject the Motion.

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*Day, dec.*Motion re-
jected.*Pritchard, Proctor.*

PALMER AND BROWN v. DENT AND OTHERS.—Motion. Where a testator, having duly executed his will, executed another will when of unsound mind, the unsoundness appearing on the face of the paper, the parties interested having refused to propound the later paper, — probate of the former granted in common form.

— John Palmer, the deceased, died on the 11th June, 1848, leaving Joseph Palmer, his brother, his only next of kin and heir-at-law, and three nephews, the only persons entitled in distribution to his personal estate in case he had died intestate. On the 2nd October, 1847, the deceased made and executed his will, appointing his brother, Joseph Palmer, and Thos. Brown executors, and disposing of his whole property chiefly amongst his near relations, which will was found after his death sewed up in the lining of the coat always worn by him up to such time, in conformity with a memorandum in his own handwriting found in his watch-pocket. On the 9th June, 1848, two days prior to his death, whilst of unsound mind, he signed a further paper, purporting to be his last will, prepared by a clerk

APRIL 26. to a solicitor, one of the attesting witnesses, from instructions taken verbally from the deceased by the other attesting witness, which document bore upon the face of it marks of the testator's unsoundness of mind. The parties interested under this later paper were cited to propound the same, with intimation, and they had executed a proxy declaring that they would not propound it, and consenting to probate of the will of 1847.

MOTION. *Dr. Harding* moved for probate of the will of 1847.

JUDGMENT. SIR H. JENNER FUST.

On the face of the paper itself there is evidence of wandering in the mind of the deceased, and the question is, whether the Court is in a condition to decree probate of the former paper, of October, 1847, in common form, without its being propounded in solemn form of law, and proved by witnesses. A Decree has been taken out, calling upon the parties interested under the later paper to propound it if they are disposed to do so; but they have declined, and I am bound to conclude that it is because they think the deceased was of unsound mind at the time. I am, therefore, of opinion that the executors are entitled to probate of the will of 1847 in common form.

Motion
granted.

Fielder, Proctor.

High Court of Admiralty.

3rd Sess.

MAY 2.

Collision. — **THE ST. LAWRENCE (BROWN).**—*Cause, by Act on Petition.*—In this case, in which cross-actions were brought by the owners of the two vessels, the British schooner *Cosmopolitan*, of 109 tons, bound from Liverpool, with cargo, for Africa, and the American ship *St. Lawrence*, of 420 tons, having, besides a full cargo, fifty-three emigrants, bound

Where the master of an American vessel, held not to be in fault, did not, at the time of the collision, order out a

from the same port for New York, left the Mersey on the 25th August, 1848, and went down channel together, pursuing nearly the same course. At four P.M. of the 27th, whilst in the Irish Channel, the vessels came in collision, and the *Cosmopolitan*, the smaller vessel, received so much damage, that, apprehending she would sink, the master and crew, ten persons (one being drowned), took refuge on board the *St. Lawrence*, by climbing up the bowsprit's shrouds. Both vessels were sailing close-hauled on the larboard tack, the wind being S.W., the *St. Lawrence* half a mile ahead. According to the schooner, whilst her crew were preparing to tack, the *St. Lawrence* suddenly stood towards her, on the starboard tack; the schooner immediately ported her helm, but the *St. Lawrence*, instead of keeping her luff or porting, as hailed to do, kept her helm to starboard, and struck the schooner on the starboard bow. The case of the American ship was, that she expected the schooner would have borne away and gone to leeward; whereas she kept her course, and endeavoured to cross the bows of the *St. Lawrence*, thereby occasioning the collision. It was charged against the master of the American vessel,—a charge denied on his part,—that he had refused to lend one of his boats to endeavour to save the life of the English seaman. The *Cosmopolitan*, having been subsequently boarded by some fishing-smacks, was brought into Kingstown harbour, and a suit for salvage was instituted against her in the Admiralty Court of Ireland.*

The Court was assisted by two elder brethren of the Trinity House.†

Dr. Addams and *Dr. Bayford*, for the *Cosmopolitan*; *Dr. Jenner* and *Dr. Deane*, for the *St. Lawrence*.

DR. LUSHINGTON.

JUDGMENT.

(After pronouncing, with the concurrence of the Trinity Masters, in favour of the *St. Lawrence* in both actions.)

But with regard to the question of costs, there are two Costs.

* 6 Notes of Ca. Supp. xvñ.

† Captain Rees and Captain Farrer.

MAY 2.
St. Lawrence.

peculiar circumstances in this case; one is, that a man on board the *Cosmopolitan*, in consequence of the collision, fell into the sea and was drowned; the other is, that application was made to the master of the *St. Lawrence* by the master of the *Cosmopolitan* to put him and the mariners on board his own ship, some time after the collision had taken place.

With respect to the first point, as to the question of fact, it is distinctly sworn by Maxwell (the master of the *Cosmopolitan*), and other persons who have made affidavits with him, and is corroborated also by the American seaman who has made an affidavit in the cause, that the man did fall overboard, and that application was made to Brown (the master of the *St. Lawrence*) for the loan of a boat, in order to attempt to recover the man. How is this met by affidavits on the other side? By the affidavit of Brown himself, stating that he was not cognizant even of the fact of a man being overboard. This does not agree with the affidavit of his own steward, for all he swears is, that a man did fall overboard and was lost, and he does not represent that an application was made by Maxwell, the master of the *Cosmopolitan*, for the loan of a boat. That is all he states. But it is utterly impossible to believe for a moment that such an occurrence did actually take place,—that a man was lost in the manner stated, when the weather was perfectly fair, in the month of August and in daylight,—it is impossible, I say, to conceive that such an accident occurred, and that the master was in ignorance of it. I utterly disbelieve it, and comparing the statements on one side and on the other, I have no hesitation in declaring, whether he refused or not, that he did not do that which it was his bounden duty to have done,—to have ordered the boat, and afforded every possible assistance to save the life of a fellow-creature.

Is that a ground for refusing costs or not? If I sought precedents, I have a reported case,* decided by Sir John Nicholl, in which he refused costs under similar circum-

* *The "Celt,"* 3 Hagg. A.R. 328.

stances. But I want no precedents; I want nothing but principle to guide me. I must hold here, and I ever shall hold, that the owners of a vessel are responsible for the whole conduct of the master whilst on board his vessel and in command of that vessel. I do not mean to say that they can be responsible, criminally speaking, for any act he may have committed of a criminal nature, for, of course, in that case the responsibility and the punishment can attach only to the wrong-doer; but, civilly speaking, the owners are responsible for any deviation from that line of conduct which it behoves a master to perform, not simply in the navigation of the vessel, and in the care of his own seamen, but in the care of those who may be thrown on board his ship by an accident of this description, and for the performance of any office of humanity. If they choose to employ a person who will deviate from the performance of these duties, and then come to this Court, they will not receive any favour from me as to costs.

MAY 2.

St. Lawrence.
Responsibility
of owners for
the conduct of
their master.

I pronounce in their favour, but I refuse to decree costs. Costs refused.

Proctors:—*Jennings*, for the schooner; *Rothery*, for the American ship.

Archers Court of Canterbury.

MAY 8.

4th Sess.

BURMAN AND CHATTAWAY v. GREVES. — Appeal. — Church-rate. Cause.—This was an appeal from the Consistorial Court of Worcester, in a cause of subtraction of church-rate, by the Churchwardens of Stratford-upon-Avon, against John Edward Henry Greves, a parishioner, to recover the sum of 7s. 5d., the amount of the rate in which he was assessed, and costs. The party was in the first instance summoned before the Justices, when he objected to the validity of the

—A defendant, condemned in the rate and costs, disobeying a Monition to pay the same, the Court was moved to pronounce him in contempt, but

MAY 8.

*Burman v.
Greaves.*

"reserved its
pain," and be-
ing moved to
signify his con-
tempt, refused:
—Held, on ap-
peal, that, the
defendant not
having been
pronounced in
contempt, there
was nothing on
which to found
a *significavit*.

rate, whereupon proceedings were commenced in the Court below on the 6th August, 1846, but no appearance was given by the defendant until the 17th September, when he appeared in person. The Libel was admitted on the 19th November, but the defendant did not give in his Personal Answers until the 21st January, 1847. Witnesses were examined upon the Libel, and on the 25th March, the defendant asserted an Exceptive Allegation, but did not appear to tender the same, and on the 6th May publication was decreed. On the 8th July, no Allegation having been brought in, the cause was assigned for sentence, and on the 16th December, the Court condemned the defendant in the rate and costs, which were taxed at £65. 19s. A Monition issued on the 17th February, 1848, and was served upon the defendant, to pay the same, to which no appearance was given, and on behalf of the Churchwardens, the Court was prayed, on the 9th March, to pronounce the defendant in contempt for non-payment of the rate and costs, but the Surrogate "reserved his pain" until the next Court, and thence until the 20th April, when the defendant having given notice to the Court that he was under the protection of the Bankruptcy Court, the Chancellor directed him to verify the averment by affidavit or otherwise, and that the party agent should have an opportunity of controverting it. On the 11th May, the defendant gave in an affidavit to verify the averment in his notice; the Proctor for the Churchwardens prayed that Letters Significatory against the defendant might issue, the prayer being renewed on the 1st June, when the Surrogate, under the Chancellor's direction, required the Proctor to give in writing the grounds for the Letters issuing. The Proctor alleged that the defendant was in contempt of the Court, and dissented from giving in writing further grounds; the Surrogate thereupon, under the Chancellor's direction, refused the Letters Significatory. From this decision the Churchwardens appealed to this Court, where, the defendant not appearing, the proceedings were carried on *in personam*.

Dr. Addams, for the Appellants, moved the Court to

pronounce for the Appeal, to retain the principal cause, to pronounce the defendant in contempt for non-obedience to the Monition issued by the Court below, and to direct his contempt to be signified.

MAY 8.
 ———
Burman v.
Groves.

SIR H. JENNER FUST.

JUDGMENT.

The rate in this case is but 7s. 5d., but the costs occasioned by the vexatious defence to the suit amount to £65. 19s., and for the payment of the rate and costs a Monition issued on the 17th February, 1848, which was returned on the 9th March, when the Proctor for the Churchwardens prayed that the defendant might be pronounced in contempt for not paying the amount of the rate and costs; but the Surrogate "reserved his pain" until the next Court-day,—that is, as I understand, the Court did not accede to the prayer of the Proctor, by pronouncing the party contumacious, and ordering his contempt to be signified. On the 30th March, the Minute is "The same at the next Court." On the 20th April, the Minute is, "The defendant having given notice to the Court that he is under the protection of the Bankruptcy Court, the Chancellor directed the defendant to verify his averment by affidavit or otherwise, and that the party agent must have an opportunity of controverting such averment: Evans dissenting." So the case stood, without anything being done, till the 11th May, when "the defendant gave in an affidavit to verify the averment in the notice served upon the Court, and Evans prayed that Letters Significatory against him might issue;" that is, that his contempt might be signified, under the Act of Parliament, to the Court of Chancery. But the party not having been pronounced in contempt, there was nothing upon which the Letters Significatory could be founded; it was necessary that he should be first pronounced in contempt. But the Proctor for the Churchwardens, the next Court-day (the 1st June), prayed that the Letters Significatory might issue, and declined to give in writing further grounds for issuing the same.

The appeal is from the Judge not having decreed Letters Significatory to issue; and the prayer of the Proctor for the

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 —
Burman v.
Groves.

Appellants is, that this Court will pronounce the party in contempt for not having obeyed the Monition to pay the rate and costs, and direct his contempt to be signified. The party, therefore, has not been pronounced in contempt; if he has been, where is the necessity for this prayer? How, then, can this Court certify? It is impossible that it can do so. For want of a foundation for that step, the Court is precluded from entering into the question as to the effect of the protection of the Court of Bankruptcy. Were it otherwise, there is the absence of the affidavit; how can the Court proceed without that affidavit, the absence of which is not accounted for? The Court might direct a Monition for *omissa*, and dispose of that part of the case; but it is not in a situation to entertain that question, as the party has not been pronounced in contempt.

Appeal
 pronounced
 against.

I am of opinion that the Court must pronounce against the appeal, and remit the cause. It is a very unfortunate case, and a most vexatious proceeding.

Proctors:—For the Appellants, *Evans*, in the Court below; *Rothery*, in this Court.

Prerogative Court of Canterbury.

4th Sess.

MAY 11.

Where the name of the deceased had been affixed to his will, at his request, by the drawer, who, on a subsequent day, in the presence and at the request of the deceased, asked two per-
 IN THE GOODS OF JOHN SUMMERS, DEC. — *Motion, ex-parte.*—The deceased died 28th August, 1849, leaving a paper, bearing date 28th February preceding, which begins, "The last will and testament of John Summers, yeoman," and after devising his house and appurtenances to his wife, Perescilla Summers, and disposing of the rest of his property, purports to be signed at the end by the deceased and his wife, and to be attested by three witnesses, in the following form:—

Signed as Witness's	Signed & Seal'd this 28th of Feb' 1849 by John and Summers Peracilla	MAY 11. — Summers, dec. sons, present at the same time (who had been sent for by the deceased), to witness the pa- per, which they did in the de- ceased's pre- sence (neither having seen the deceased's name written), and the de- ceased there- upon took a seal and put it on the wafer, saying, "I de- liver this as my act and deed." — Held, that this was not a sufficient exe- cution.
William Furmedge (Seal.)		
George Hood (Seal.)	John Summers (Seal.)	
Robert White (Seal.)	Peracilla Summers (Seal.)	

It appeared that, on the day the paper bore date, the deceased sent for Furmedge, who, when he arrived at the residence of the deceased, was requested by him and his wife to make their wills, which he did from their joint instructions; that after Furmedge had written the will (the deceased being incapable of holding a pen from rheumatism), he also wrote the words "signed and seal'd, this 28th February, 1849, by John and Perscilla Summers, John Summers, Perscilla Summers," at the joint request of the deceased and his wife; and at the same time he also wrote "Signed as Witness's, William Furmedge:" so that neither the deceased nor his wife signed the paper. On a subsequent day, shortly after this transaction, the deceased called on and sent for Furmedge, Hood, and White, and when all three had assembled at his house, Furmedge, in the presence and at the request of the deceased, asked Hood and White to sign their names as witnesses to the paper,—according to White, "to his will,"—which they did in the presence of the deceased and his wife; but neither of the witnesses saw Furmedge sign the deceased's name; and then Furmedge gave a seal to the deceased, who put it on the wafer at the end of the paper, and said, "I deliver this as my act and deed," and his wife did the same.

Dr. Bagford moved for administration with the will to *MORRIS*, the widow, there being no executor or residuary legatee named; submitting that the signature of the deceased, though written by another person, had been sufficiently acknowledged by him in the presence of two witnesses.

MAY 11

SIR H. JENNER FUST.

Summary, dec.

DECREE.

Motion
rejected.

I am of opinion that the execution is not sufficient. I do not consider, under the circumstances, that the signature was acknowledged in the presence of two persons present at the same time. All that is said is, that Furnedge, at the request of the deceased, asked the other two persons to sign their names as witnesses, not that the deceased acknowledged the signature in their presence. I am of opinion that that was not a sufficient execution under the circumstances, and I reject the Motion.

Scurlock, Proctor.

AN ALLEGATION. **JONES v. NICOLAY.**—*Allegation.*—This was a business of propounding a paper in the form of an order, by a testator in India upon his agents in England, to pay to E. and Co., on account of M. L. J., a legatee named in his will, £4,000, signed by the testator, and attested by witnesses, having been proved as a codicil to his will in India.—Held, to be admissible to proof.

JONES v. NICOLAY.—*Allegation.*—This was a business of proving in solemn form of law a paper, as a codicil to the will of Edmund George Nicolay, formerly a captain in Her Majesty's 29th regiment of Infantry, late of Mhow, in the East-Indies, deceased, promoted by Mr. W. S. Jones, sole executor named in the will, against Dame Mary Nicolay, widow, mother of the deceased, and residuary legatee named in the will. The paper in question, in form and contents, is as follows:—

To Messrs. Cox & Co., London.

Mhow, 24th June, 1844.

Gentlemen,

At twelve days' sight, please to pay to Messrs. Edmonds & Co., on account of Maria-Lucretia Jones, the sum of Four thousand pounds sterling.

I remain,

Gentlemen,

Your obedient Humble Servant,

E. G. Nicolay.

£4,000. „ 0 „ 0

Witnesses

J. G. Scott, Lieut. 22d Regt. N.I.

W. S. Jones, Lieut. 22d Regt. N.I.

The Allegation propounding the paper pleaded that the testator died at Mhow on the 25th June, 1844, a bachelor, leaving Dame Mary Nicolay, his mother and next of kin;

that on the 8th September, 1843, he made and duly executed his will, probate of which, together with the codicil propounded, had been granted by the Supreme Court at Bombay to the sole executor; that by the will, *inter alia*, he bequeathed legacies to Maria L. J., spinster, sister of Mr. W. S. Jones, the executor, and to two other sisters of the executor, whom he substituted for his mother as his residuary legatees in the event of her dying in his (Mr. Jones's) lifetime; that at the date of the will, the testator, who had then lately quitted the army, was engaged to be married to the said Maria L. J., then resident with her mother at Mulligaum, in the Presidency of Bombay; that certain deeds of settlement, to be executed previous to such intended marriage, had been prepared in England by the testator's directions, and were then sent out to India, the marriage being delayed only until their arrival, which did not, however, take place until after the death of the testator; that in the year 1844, the testator accompanied the family of Maria L. J. from Mulligaum to Mhow, the regiment of Bombay Infantry, in which Mr. W. S. Jones was a lieutenant, being ordered to quarters, and whilst so at Mhow, in June, 1844, he was attacked with a liver-complaint, which soon assumed a serious aspect; that, on the 24th June, having been informed that his recovery was despaired of, and that he had probably but a few hours to live, and so believing, he thereupon, having a mind and intention to make a codicil to his will, and thereby further to give and bequeath to his betrothed wife, the said Maria L. J., the sum of £4,000, then (as he well knew) about to be placed to his credit by his mother with his agents and bankers, Messrs. Cox and Co., of Westminster, gave instructions to Mr. W. S. Jones, then present, and who thereupon, at the request and from the dictation of the testator, wrote the codicil propounded (the same being so by the dictation of the testator) in the form of a bill or order on Messrs. Cox and Co., for payment of the said sum of £4,000 to Messrs. Edmonds and Co., of Bombay, on account of Maria L. J., and that such codicil was approved of and duly executed by the deceased; that in the interval between the making and executing of

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Nicolay.*

the codicil and his decease in the morning of the following day, the testator, though gradually sinking, continued of perfectly sound mind, and expressed in pointed terms his satisfaction at having made the further provision for Maria L. J., contained in the codicil, and without having done which, he said, he should not have died happy; that a notarial copy of the codicil, of which probate had been granted (in common form) by the Supreme Court at Bombay, was endorsed by Messrs. Edmonds and Co. (who were then solvent, but have since become bankrupts) and sent to London, payable as a bill by Messrs. Cox and Co. to Messrs. Huth and Co., of London, on account of Maria L. J.; that payment thereof as a bill was refused by Messrs. Cox and Co., partly in consequence of the testator's death, and partly owing to their having received a notice not to pay it from the mother of the testator, and Messrs. Cox and Co. have since paid the balance in their hands (£4,080) belonging to the testator's estate, into the hands of the Accountant-General of the Court of Chancery, pursuant to an order of that Court made in a cause, "*Nicolay v. Jones*," therein depending.

The admission of this Allegation was opposed.

April 26.
Argument.

Dr. Harding, in opposition.—There have been cases where similar documents were propounded, but they have been, almost without exception, of two classes: first, where the paper, though not strictly testamentary, or being informal, was testamentary on the face of it, and intended to operate after death. *Tapley v. Kent*.^{*} *Trevelyan v. Trevelyan*.[†] *Bartholemew v. Henley*.[‡] Secondly, where it has been pronounced for, with another paper, as together containing the will, being connected with the former will by express reference, or having been executed at the same time, or disposing of the same property. *Masterman v. Maberley*.[§] *Habergham v. Vincent*.^{||} Down to 1829, in no case of this kind, not in one of these classes, has the Court granted probate of the paper; and the principle is laid down in *Glyn v.*

* 4 Notes of Ca. 292.

† 3 Phill. 317.

|| 2 Ves. jun. 231.

† 1 Phill. 149.

§ 3 Hagg. E. R. 235.

Oglander.* There is no ambiguity on the face of the instrument, calling for parol evidence. No reason is assigned why the testator should not have made a formal codicil, nor does it appear that he expected this paper would have effect as a codicil, or that he intended it should operate only in the event of his death. There is nothing to show, on the face of the instrument, that it was revocable. *Swinburne, On Wills*.† *Jarman, On Wills*.‡ *Jarman, Conveyancing*.§ *Williams, On Executors*.|| *Shingler v. Pemberton*.¶ *Wigram, Evidence*.** *Gladstone v. Tempest*.†† *Fletcher v. Fletcher*.‡‡ "It is essentially necessary," says Mr. Justice Williams, "that the instrument should be made to depend upon the event of death, as necessary to consummate it; for where a paper directs a benefit to be conferred *inter vivos*, without reference, expressly or impliedly, to the death of the party conferring it, it cannot be established as testamentary."

Dr. Twiss, on the same side.—In all cases of such papers, before the Wills Act, there was on the face of the paper something to show that it was to come into operation after death, or there was nothing to denote when it was to come into operation, whether before or after death. Here it is apparent when the paper is to come into operation, at twelve days' sight. It is a question how far the Court can in law admit evidence to contradict the instrument, or to show the intention of the party in executing it. *Woodbridge v. Spooner*.§§ *Thorne v. Rooke*.||| *Tate v. Hilbert*.¶¶

Dr. Addams, in support of the Allegation.—An attempt is made to introduce a new principle, never before recognized in a Court of Probate. The authorities cited on the other side are from a Court of Construction. The question of intention must be resolved from the paper itself, and from extrinsic evidence; this is the principle upon which

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Jones v.
Nicolay.

* 2 Hagg. E.R. 432.

‡ 1 Vol. c. 2.

|| P. 1, b. 2, c. 2, s. 3.

** Pp. 66, 74.

†† 4 Hare, 67.

||| 2 Curt. 799. 1 Notes of Ca. 254.

¶¶ 2 Ves. jun. 120.

† P. 1, sect. 3.

§ P. 2.

¶ 4 Hagg. E.R. 386.

‡‡ 2 Curt. 650.

§§ 3 Barn. & Ald. 233.

MAY 31.

*Jones v.
Nicolay.*

this Court has acted since, as well as before, the Wills Act. I am content to take the doctrine from Mr. Justice Williams's work :* "Although much greater strictness seems to have prevailed in earlier times, it has been decided in a great variety of modern instances, that it is not necessary that an instrument should be of a testamentary form, in order to operate as a will : indeed, it may be considered as a settled point, that the form of a paper does not affect its title to probate, provided it is the intention of the deceased that it should operate after his death." Then the Court must have parol evidence to show this intention. "Thus a deed-poll, or an indenture, a deed of gift, a bond, marriage settlements, letters, drafts on bankers, the assignment of a bond by endorsement, receipts for stock and bills endorsed 'for A. B.,' an endorsement on a note 'I give this note to C. D.,' promissory notes, and notes payable by executors to evade the legacy duty, have been held to be testamentary." None of these instruments were testamentary on the face of them; the intention was derived from extrinsic evidence. "The true principle to be deduced from the authorities appears to be, that, if there is proof, either in the paper itself, or from clear evidence *dehors*, that it was the intention of the writer of the paper to convey the benefits by the instrument which would be conveyed by it if considered as a will; secondly, that death was the event that was to give effect to it; then, whatever may be its form, it may be admitted to probate as testamentary." This was a paper dictated by the deceased on his death-bed, and executed in the presence of witnesses. If the parties could have recovered upon it as a bill, it would have been better; but they could not.

Dr. Bayford referred to King's Preceptor v. Duincant . . .

PER CURIAM.—I must take time to consider this case. I should have liked to be informed whether this paper is a valid instrument to enable the party to recover the amount by an action at law by the executor under the will; and also whether, if Messrs. Cox and Co. had not received inti-

* Law of Exec. P. 1, b. 2, c. 2, sec. 3.

† 3 Hagg. E. R. 218.

mation of the death of the deceased, and notice from the mother not to pay the bill, they would have paid the money.

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*Jones v.
Nicolay.*

SIR H. JENNER FUST.

May 11.
JUDGMENT.

I am of opinion to admit this Allegation to proof. The paper in question purports to be an order signed by the deceased gentleman, in the presence of two witnesses, present at the same time, in India, in favour of a person to whom he was about to be married, upon Messrs. Cox and Co., to pay to her account, at twelve days' sight, the sum of £4,000, which, according to the Allegation, he knew was about to be placed to his credit with Messrs. Cox and Co., and the paper is dated immediately preceding the death of the deceased. The question is, whether this paper, being in the form of an order on his bankers or agents, can be considered a testamentary instrument. The doubt arises, under all the circumstances of the case, from the paper itself, purporting to be an order upon a banker, *prima facie* not a testamentary instrument. But it appears that it was signed in the presence of two witnesses; that it was attested by these witnesses; that it was drawn up, by the direction of the testator, by the executor named in the will, the deceased being at the time in almost a dying state; and the Court is of opinion, under these circumstances, a doubt arising on the face of the instrument itself,—without giving any opinion as to the effect of the evidence, supposing these facts to be proved,—that the Court is competent to admit, and therefore is bound to admit, the Allegation, in order to receive proof of the manner in which the paper was executed by the deceased. All the circumstances must be in the consideration of the Court, in deciding the question whether the paper is to have effect and operation as a testamentary instrument.

I am of opinion that there is sufficient in this Allegation to entitle the Court to admit it to proof; and if so, the Court is bound to admit the Allegation. Allegation admitted.

Proctors:—*Nicholl*, for the Executor; *Tabbs*, for the Residuary Legatee.

High Court of Admiralty.*Add.CourtDay.*

MAY 14.

Salvage rendered by one steam-vessel to another which had broken the intermediate shaft connecting the two engines, — suit sustained, but the case of the salvors held to be exaggerated and their claim most exorbitant.

THE "NIMROD" (PILE).—Cause, by Act on Petition.—This was a cause of salvage by the master, owners, and crew of the steam-vessel *Blenheim*, of 399 tons and 400-horse power, against the steam-vessel *Nimrod*, to obtain a remuneration for salvage services rendered to her. The salvors in their Act alleged that the *Blenheim* was on her voyage from Belfast to Liverpool, with passengers and cargo, when, at 2 A.M. on the 18th April, whilst she was steering S.E. and $\frac{1}{2}$ S., the look-out man reported lights on the starboard beam, whereupon the master distinctly made out towering lights in a S.S.W. direction, distant about twelve miles, and considering that in all probability they were exhibited by a vessel in distress, he determined to bear down to her, and, altering the vessel's course, steered towards the lights, which he approached within eleven fathoms water, and at the distance of two miles, when he made out that the lights were hoisted on board a vessel (the *Nimrod*) lying broadside to the sea, completely covered with signal lights, and having an ensign hoisted at her main-mast head; that it being 3.30 A.M., still dark, with the wind blowing hard from N.E. to N.N.E., and a heavy sea, it was found impracticable to approach her nearer without very great risk; but the master of the *Blenheim*, being aware that the *Nimrod* was in a very dangerous locality, and must be greatly in need of assistance, determined to lie by her until daybreak; and as soon as it was sufficiently light, the *Blenheim* was steered towards the *Nimrod*, whose master, when within hailing distance, stated that his vessel was disabled, and her machinery broken down, and requested the master of the *Blenheim* to take her in tow, at which time the *Nimrod* was rolling very heavily, and driving broadside on right into the bay on the West end of Hoyle Bank; that, after considerable difficulty and risk, the *Blenheim* succeeded in getting two hawsers on board the *Nimrod*, and took her

in tow, steering a course E.N.E., to clear the buoy off the Constable Bank, and towed her to Liverpool, where they arrived at 8.30 A.M. of the same day; that, had it not been for the ready and efficient assistance thus rendered by the *Blenheim*, the *Nimrod* would have gone on shore in the bay on the West end of the Hoyle Bank, where she must have been lost, with her valuable cargo, and in all probability the lives of all on board, inasmuch as she was driving broadside on right into the bay, with the force of wind and sea, and the flood tide setting on to the shoals.

The Answer of the owners of the *Nimrod* (the Cork Steam-Ship Company) alleged that that vessel, of the burthen of 493 tons, and of 300-horse power, was on her voyage from Liverpool to Cork, with passengers and cargo, when, at 10 P.M. of the 17th April, Point Lynas Light bearing W., distant four miles, and Beaumaris Light bearing S. by E., distant eight miles, the intermediate shaft connecting the two engines broke, thereby disabling the starboard engine, but without injuring the larboard engine, which could have been easily worked, if necessary; that on the shaft breaking, sail was set upon the *Nimrod*, and she was wore round to the N. and E.; that the wind blew a strong breeze from the N., and the steamer headed E. by N. to E. by N. $\frac{1}{2}$ N., making for the N.W. Light-ship, and made good a course of about S.E. by E. $\frac{1}{2}$ E., being under complete command; that, having passengers on board, and knowing that many inward-bound steamers would pass near, the master considered it his duty to display signals for assistance, in the first instance guns being fired and rockets sent up; that both the anchors were kept in readiness to bring up, if necessary, during the night; that an ensign was run up at the peak, but none was hoisted at the main-mast head; that about 4 o'clock, when the *Blenheim* came alongside her, the *Nimrod* having then good steerage way on her, Pile, the master, asked the master of the *Blenheim* to give them a tow, to which he assented, and warps being secured, the time in getting them on board not exceeding a quarter of an hour, the *Nimrod* was taken in tow, she being then three or four miles to the N. of the buoy off the Constable Bank,

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where there was upwards of six fathoms water, and that she was in tow of the *Blenheim* three hours and forty minutes. It denied the averments in the Act as to the peril of the *Nimrod*, and alleged that, if she had been in any danger, the lar-board paddle-wheel might have been worked with ease, the steam having been kept up, and she could have made head-way to windward easily, working only the one paddle-wheel.

The material allegations in the Answer were denied by the owners of the *Blenheim* in their Reply.

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Dr. Addams and *Dr. Bayford*, for the salvors; *Dr. Robinson* and *Dr. Twiss*, for the owners.

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 JUDGMENT.

DR. LUSHINGTON.

This is an action of salvage brought by the owners, master, and crew of the *Blenheim*, a steamer, against the *Nimrod*, also a steamer. The value of the property is agreed to be £19,000, and this is almost the only fact which is agreed to in the cause, issue being taken on nearly every other statement on one side or the other, some of these issues involving points of local, nautical, and mechanical knowledge, upon which it has been a very difficult task to decide, looking to the evidence before me, and with the limited knowledge I possess as to some of the questions. For this reason it was I took time to consider my judgment.

Facts.

It appears that the *Blenheim*, with 100 passengers and a valuable cargo, was on her voyage from Belfast to Liverpool; that about 2 A.M. of the 18th April, 1849, lights were seen on her starboard beam; that Gowan, the master of the *Blenheim*, then altered his course, and steered towards the lights, and approached till within eleven fathoms water, and about the distance of two miles from the vessel he was coming to. It is admitted on all hands that these lights were signals of distress shown on board the *Nimrod*; but there is a dispute as to how many lights, and of what kind the signals were. It appears to me that this question is of very little importance in the cause, because, I apprehend, that signals of this description are held out to be seen, in order to cause vessels to come and render assistance, and it is admitted that these lights were signals for assistance. It

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is further alleged that it was impracticable for the *Blenheim*, in the then state of the weather, to approach closer; so she lay by till daybreak, which, on the 18th April, was between 4 and 5 in the morning. At that time the *Blenheim* came alongside the *Nimrod*; and on behalf of the *Blenheim* it is said that the *Nimrod* was rolling very heavily, and driving broadside on into the Bay, on the West end of Hoyle Bank. Whether this averment be true or not, will form not an unimportant consideration in the determination of this case. With some difficulty they got two hawsers on board of her, took her in tow, and reached Liverpool about half-past 8 A.M. on the 18th April.

The two main grounds, on which a large rate of salvage is claimed, are, first, that the *Nimrod* must, without such assistance, have gone on shore in the Bay, because her sails were only of use to keep her steady, but were not powerful enough to propel her, there was no anchorage-ground, and her anchors were insufficient to hold her; second, that the *Blenheim*, in approaching so near, incurred very great risk and peril, by reason of the weather and the dangerous locality.

As the main ingredients of all salvage services are the danger to the ship saved, and the danger to the ship which is the salvor, I must of necessity form some conclusion on the questions I have stated.

- On examining the statements made on the part of the *Nimrod*, it will be found that all the averments already referred to are contradicted, and another and a different set of facts brought forward. According to this version, the *Nimrod*, being upon a voyage from Liverpool to Cork, when off Point Lynas, about 10 o'clock in the evening of the 17th April, the shaft connecting the two engines broke; the star-board engine was disabled; the larboard engine might have been worked; upon this fact issue is taken. It is then said that sail was set upon the *Nimrod*, and she was wore round to N. and E. As to the weather, on the part of the *Nimrod* it is said there was a strong breeze from the N.,—not a gale from N.N.E.; that the *Nimrod* headed E. by N. to E. by N. $\frac{1}{4}$ N., making for the N.W. Light-ship, and made good a course, allowing for lee-way after the flood tide, at 1 A.M., of S.E.

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by E. $\frac{1}{2}$ E. It is also said that the anchors were sufficient and in readiness ; that a little before 4 o'clock, the *Nimrod*, instead of being in eleven fathoms water, was in seventeen, and at the period when the *Blenheim* arrived, the *Nimrod*, having good steerage-way, was proceeding on her course to Liverpool. It is further said that the *Nimrod* was at least three or four miles to the N. of the Buoy off the Constable Bank, and the depth of water thereon was amply sufficient at the period for approaching and going over the Bank. The *Nimrod's* course is said to have been E. $\frac{1}{2}$ S. to E. by S. All danger is denied to either ship, and it is said that at midnight the wind moderated and the sea went down.

On examining further, I find that, in the Reply, issue is taken on all these facts, as to the engines, the sails, the wind and sea, and the course is said to be not to the Light-ship, but the West Hoyle Bank ; that the *Nimrod* was one hour and a half before she would wear round to the N. and E., during which time she was nearing the shore, drifting to leeward. It is said that the course from the place where the *Nimrod* was taken in tow, namely, Great Ormes Head bearing W. and by N. distant four miles, was S.E. and by E., which would have taken the ship on the Rhyle Flats. It is further said that the anchors could not hold in a sandy bottom, having no flukes, and being too small, and that the depth of water is erroneously stated ; and there is a conflict as to where the *Nimrod* was when taken in tow. Then follow a denial that the *Nimrod* could have got into Molfre Roads or Beaumaris Harbour, and an averment that the course pursued was E. and by N. and E.N.E. when the breakers of the Buoy on the Constable Bank were seen.

Now I am bound, under these circumstances, to look at the evidence narrowly and carefully ; and the evidence by which I am to determine all these questions consists of fifteen affidavits on the part of the salvors, and twelve on the part of the owners.

Evidence.

First, then, as to the degree of danger in which the *Nimrod* was placed by the accident which happened to her machinery,—the breaking of the intermediate shaft connecting the two engines. On the part of the *Blenheim*, it is

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said that both engines were wholly disabled by this occurrence ; on the part of the *Nimrod*, that the larboard engine might have been easily worked, had there been occasion for it, and that the steam was kept up until morning.

The evidence is entirely conflicting. Mr. Grantham, a civil engineer, swears that he examined the engines, and that they were both rendered useless, and he states his reasons. The opposition to these conclusions is the evidence of Mr. McConochie and Mr. Blaikie, both engineers of experience, both well acquainted with these very engines, and they depose, after circumstantially stating the facts and their reasons, that the larboard engine might have been used.

Now what possible means have I for judging between these statements? How am I to test this evidence? Of course, I cannot say whose is the best opinion, nor can I form from the mere statements of the fracture any conclusion of my own as to its effect, nor could I rely upon the evidence of an engineer unless he saw the engine. Under these circumstances, I must of necessity draw my conclusion from the other circumstances of the case.

Whatever description I take of the wind, the weather, and the locality where the accident occurred, I think that the expediency of removing the vessel from that locality, and getting her into some place of perfect safety (which could not reasonably be predicated of the place where she lay), was so apparent, that it was the duty, and must have been the inclination, of the master of the *Nimrod*, to have used the larboard engine for that purpose, could it have been used immediately and with facility. The absence of all attempts to use the engine when signals of distress were made and passengers were on board, satisfies my mind that, in the opinion of the master and the engineer on board the *Nimrod*, the larboard engine could not have been worked without delay, and with safety and effect. I need not go the length of saying that that engine was totally disabled ; it is not necessary in this case to do so.

The next point for consideration is, whether, the engines being practically useless, the *Nimrod* was drifting upon a

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lee-shore, and must have gone on shore, if assistance had not been rendered to her. This question depends on the weather, the existence of anchorage-ground, the quality and power of the anchors, and the set of sails.

It is not denied that there was anchorage-ground in the neighbourhood; and from the best information I can obtain, I believe that there was fair anchorage-ground in that vicinity. But of that, of course, the *Nimrod* could not effectually avail herself, unless she had adequate anchors; and here again is a strange conflict of evidence. Mr. Mackie, who is a surveyor of shipping to the Liverpool Marine Assurance Company, swears that the anchors of the *Nimrod* were too light, and of bad form. There are other affidavits to the direct contrary. I cannot help thinking that there may be some difference of opinion as to the proper shape and make of anchors at Liverpool,—some preferring the pickaxe form, and others a different form. But I cannot enter into questions as to the shape of anchors. The *Nimrod* had five anchors on board, two of 15 cwt. and three smaller ones. It is contrary to all probability that a vessel engaged in carrying passengers and freight from Liverpool to Cork should be wholly unfurnished with sufficient anchors and chains, and where I have to decide upon direct evidence so conflicting, it is by such circumstances my judgment must be governed. I conclude, therefore, that for all ordinary purposes, in all ordinary weather, the anchors and cables were sufficient for the use of the vessel and for her safety.

But I should say there is a very strong affidavit on behalf of the owners from Mr. Green,—and I must take it that he is a person of ability, being surveyor of steamers,—and he says: “I am decidedly of opinion that the first-mentioned anchor and chain of the *Nimrod* would alone be sufficient to hold her in a gale of wind, in an open roadstead.” Supposing this evidence to go a little beyond the facts, still it is very strong testimony in support of the conclusion to which I have come.

Now as to the sufficiency of the sails, I think the evidence clearly preponderates in support of the *Nimrod's* averment, that the set of sails were efficient; not so much so as sails

for sailing-vessels, but sufficiently so for common and ordinary purposes.

Then what was the state of the wind and sea? It appears that, towards the end of the night of the 17th, and the early part of the morning of the 18th, the wind blew more strongly, and there was a heavier sea on. I again say, it is quite impossible to reconcile the evidence, or to tell with certainty whether the wind blew a little from the E. of N. or not; but I am of opinion that there was not, at the time when the *Blenheim* took the *Nimrod* in tow, a strong gale from the N.E., nor was the weather boisterous.

An affidavit on the part of the salvors is not unimportant for this purpose; it is the affidavit of John Jones, a master of the N.W. Light-ship, with an extract of the ship's Log annexed, whence it appears that, on the 18th April, at 1 o'clock, the wind was N.N.E., "strong breezes and clear;" at 3 o'clock, "moderate breezes and cloudy;" at 5 o'clock it was N.E., "fresh breezes and cloudy," and so until 7 o'clock.

Having, to the best of my judgment, formed my opinion Result. on these points, I now approach the question to which all these inquiries tend: Was the *Nimrod*, when the *Blenheim* came to her assistance, in imminent danger? Was she in danger of drifting on the shore and of becoming a wreck? I answer that question in the negative, bearing in mind the state of the weather and the locality. I cannot bring myself to think that the breaking down of the engines is generally attended with so very great danger as is represented; it may be so where other circumstances concur; but it is an accident of no very unfrequent occurrence, and not, as I believe, generally attended with such fatal consequences. Were it otherwise, I doubt if travelling by steam-packets would be so universal.

I am, therefore, of opinion that, supposing the wind not to have increased, the *Nimrod* might have anchored with a reasonable prospect of safety; secondly, that, in the then state of the wind and weather, she might, at daybreak, have been taken to Beaumaris.

I am fully aware that these are nautical questions, on

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which my judgment may be very liable to error ; but neither party thought fit to request the attendance of Trinity Masters, though fully as necessary in this case as, if not more so than, in most cases of damage. I have, therefore, been left entirely to my own resources, aided by such nautical advice as it was in my power to obtain. I think there was no necessity for the *Nimrod* to attempt to enter Beaumaris in the night-time, neither do I think that there was at day-break a fresh gale from N.N.E., to prevent her entering that port. It is on the supposition of such facts that the affidavit of Lieutenant Lord is founded, and unless the facts are as supposed, the conclusion falls to the ground. It is utterly useless to produce such affidavits as this, from persons who, not having been present, form mere opinions upon facts laid before them, and draw hypothetical conclusions. Generally speaking, hypothetical affidavits are utterly useless. There may be cases in which it is desirable to have the affidavits of persons possessed of local knowledge, to instruct the mind of the Court, in cases where Trinity Masters do not attend : when they do attend, the necessity for affidavits of that kind is superseded.

The assistance rendered was most desirable.

Being of opinion that the *Nimrod* was in no immediate danger of destruction, I still think that she was in a condition which rendered assistance most desirable ; if the weather had become more boisterous, actual danger might have occurred, although she was in no immediate danger.

With regard to the *Blenheim*, there may have been some difficulty, though not very great, in getting the hawsers on board ; but I think she was not placed in any danger whatever from any cause. She was in perfect trim, and I think that the representation, that she incurred danger from approaching the locality where the *Nimrod* was, is utterly and altogether unfounded. What was to prevent her from approaching the locality ; and what chance of danger could she have incurred in nearing the *Nimrod* ? The only chance of danger was that of the two vessels coming in collision.

The service is undoubtedly one of merit, and should be duly rewarded. I do not leave out of consideration the great value of the *Blenheim* and her cargo, and that she had

a large number of passengers on board. The service lasted, commencing with the period when the *Blenheim* altered her course till the time of reaching Liverpool, from 2 o'clock in the morning until 8, or about six hours. Part of this time was occupied in towing the *Nimrod* up the river Mersey.

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I am of opinion that the claim made of £8,000 (bail being taken for £6,000) is most exorbitant, and I think many of the statements of the salvors most exaggerated. I think £600 is an ample reward for a service which, though valuable in itself, entailed no risk, or loss, or great labour upon the salvors. Adequate rewards encourage the tendering and acceptance of salvage services; exorbitant demands discourage their acceptance, and tend to augment the risk and loss of vessels in distress.

Allotment of salvage.

Proctors:—*Rothery*, for the salvors; *Tebbs*, for the owners.

THE "CLARENCE" (TURNER).—*Cause, by Act on Petition.*—This was originally an action by the owners of the brig *Catherine* against the *Clarence*, a steam-vessel, to recover the loss sustained by the brig in a collision between the two vessels, a cross action being brought by the General Steam Navigation Company, the owners of the *Clarence*, against the *Catherine*. The Court, on the 11th May, 1849, pronounced both vessels to blame, and that the damage should be borne jointly, referring the amount to the Registrar and Merchants, who reported the full amount of loss sustained by the *Catherine* at £648, and that by the *Clarence* at £118. 18s. 10d., disallowing in the claim of the latter £260 for "detention of the vessel from 1st to 13th August, 1848, while under repair, at £20 per day," as demurrage. The Steam Company, owners of the *Clarence*, objected to this part of the Report, on the ground that the vessel, during that time, was useless to her owners, and that the sum claimed was reasonable.

Collision.—Objection to Registrar's Report disallowing demurrage during the detention of the vessel under repair,—not sustained. — In cases of collision, it does not follow, as a matter of necessity, that anything is due for such detention: under circumstances, such a consequence may follow; but the plaintiff must allege and prove his loss.

Dr. Addams, for the Steam Navigation Company, in objection to the Report.—It is alleged that the Steam Navigation

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tion Company sustained no real loss by the detention of the *Clarence*, as they had other vessels which they could have put on ; but this is no ground for disallowing the claim. Where a vessel, damaged by another, is detained under repair, the owner is not in all cases to be put to proof that he has actually sustained loss thereby ; it would be inferred from the fact of the vessel being laid up. The general rule is, that where a vessel is damaged by collision, her owner is entitled to recover the amount of the repairs and the loss by her detention during the time of repair.

Dr. Robinson, on the same side, cited *the "Hebe,"** and *the "Gazelle."*†

Sir J. Dodson, Q.A., for the owners of the *Catherine*.—It is not proved that any loss was actually sustained by the detention of the vessel. The voyage was not interrupted. In *the "Gazelle"* it was determined that the party is entitled to recover for any loss he had sustained ; but a loss he might by possibility sustain cannot be included. Before the Registrar and Merchants, the Company were asked to show the loss they had sustained by the detention, and they evaded the question. [*Addams*.—In *the "Hebe,"* the Court touched the very point in dispute : "I am of opinion that the owner of the vessel run down is entitled to demurrage, upon the ground of what would have been the probable amount of the earnings of the vessel during the period of her actual detention."] There the vessel would have proceeded on that voyage but for the detention.

Dr. Harding, on the same side.

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DR. LUSHINGTON.

In this case an action of damage was first entered by the owners of the *Catherine* against the *Clarence*, a steam-vessel, the property of the General Steam Navigation Company ; afterwards a cross action was commenced, and the result of both actions was, a Decree finding both vessels to blame for the collision : consequently, the loss sustained by each vessel was as to a moiety to be paid for by the other vessel.

* 2 Rob. jun. 535. 5 Notes of Ca. 176.

† 2 Rob. jun. 279. 3 Notes of Ca. 75.

The usual reference was made to the Registrar and Merchants, to ascertain the amount of damage each vessel had sustained. The Registrar brought in his Report on the 22nd February, which was objected to on behalf of the Steam Navigation Company; an Act on Petition was entered into, and the ground of objection is stated in the Act to be the disallowance of the sum of £260, claimed by the Company in the name of demurrage, viz. £20 per day whilst the vessel was under repair in consequence of the damage done to her, and it is alleged that this is a reasonable charge.

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Now an action of damage, as it is called in this Court, is an action to recover the loss sustained, in consequence of a collision, from a wrong-doer. The party aggrieved is entitled to be put, as far as is practicable, in the same condition as if the wrong had not been suffered. The damage may be direct, as the amount of repair done; or consequential, as where a fishing voyage is lost, or where the vessel would have been beneficially employed. But in all cases the party plaintiff must allege and prove that he has sustained an actual loss, and also afford means for ascertaining its amount.

I now then proceed to consider what was the loss alleged, and the evidence in support of the allegation.

Before the Registrar and Merchants was produced the affidavit of Mr. Pratt, assistant surveyor to the Company, who states that the claim is a moderate claim, and that the Company have received much more for the loan of their steamers, and he mentions an instance in 1842 of £60 a day being so paid. It may be very true that £20 per day is a very moderate estimate for the hire of such a vessel; but this affidavit does not go to the point, nor to the real question. The question is, not at what rate such a vessel might be hired, but how much the Company have lost by her detention; and he does not say that the Company have sustained one shilling of loss. Two things are absolutely necessary,—actual loss, and reasonable proof of the amount. Both must be proved; the Registrar and Merchants cannot report loss sustained without evidence. Mr. Adams, who

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had been manager of a steam company, and is well acquainted with the earnings of steam vessels, has been produced, but he leaves the case exactly where it was before; he proves no loss at all.

Objection over-ruled.

Under these circumstances, I have no hesitation in saying that I must overrule the objection, and confirm the Report. The objection is founded upon a misapprehension of the principle upon which the Court proceeds in assessing the amount of damage. In cases of collision, it does not follow, as a matter of necessity, that anything is due for the detention of the vessel during repair. Under circumstances, no doubt, such a consequence may follow; but the plaintiff must allege and prove his loss, which he has not done upon the present occasion. Had the plaintiff proved that the vessel would have earned freight, and that such freight was lost to him by the collision, then the case would have fallen within the principle.

Report confirmed.

I therefore pronounce against the objection, and confirm the Report, with costs.

Proctors:—*Toller*, for the Company; *Nicholson*, for the owners of the brig.

Collision. — A vessel close-hauled on the starboard tack, apprehending a collision with another vessel sailing free, at night, having, in order to ease the blow, starboarded the helm,—held to be to blame.— Difference of opinion between the two Trinity Masters.

THE "IMMAGANDA SARA CLASINA" (ZOETELIEF).—*Cause, by Act on Petition.*—This was a cause of damage by collision brought against the Dutch ship *Immaganda Sara Clasina*, by the owner of the British barque *New Forest*, against which a cross action was brought by the owners of the Dutch ship.

The Act on Petition, on behalf of the owner of the *New Forest*, alleged that, on the 17th January, 1850, she had arrived off St. Catherine's Point, Isle of Wight, on her voyage to South America, the wind being N.N.E.; that on the following morning, the wind shifted to S. by W., and came on to blow heavily, when the barque, which had reached down to the Start, was driven back, and continued to beat about against an adverse wind until the evening of the 19th, when, at half-past seven P.M., about five leagues from the Wight, standing to the W.S.W., close-hauled on the star-

board tack, the wind blowing fresh from the N.W., it not being so dark but that vessels could be seen at the distance of a quarter of a mile, a good look-out being kept, the Dutch ship was seen standing up Channel, with the wind several points free, about two points on the barque's weather bow, and approaching her; that thereupon the carpenter held up a brilliant signal-lantern from the fore rigging, on the starboard side, while the watch loudly hailed the Dutch ship, but no answer was returned by her, and no alteration was made in her course, until she came within a cable's length of the barque, when her helm was ported, but too late to prevent a collision; that, in order to ease the blow and save the barque from destruction, the carpenter called to the man at the helm to starboard, which was instantly done, and the barque answered her helm, but in less than a minute, the ship ran stem on into her, doing her very considerable damage; that the barque, in a crippled state, was compelled to stand for Southampton, where she arrived on the 21st; and that the collision was imputable solely to the misconduct of those on board the Dutch vessel, in not bearing away and keeping clear of the barque.

The Answer, on the part of the owners of the *Immaganda Sara Clasina*, alleged that she was on a voyage from Batavia to Amsterdam, in which she had experienced tempestuous weather, and on the 18th January, entered the British Channel, the wind S.W. by S., shifting on the morning of the 19th to W.N.W.; that at half-past seven P.M. of that day, all hands being on deck, and a strict look-out being kept, the *New Forest* was seen a short distance ahead, rather on the larboard bow, but from the haze and darkness it was at first uncertain whether she was proceeding up or down Channel, but the mate instantly called out "Port, hard a-port," and the man at the helm immediately put it hard a-port, and she began to bear away rapidly; that a light was exhibited over the ship's larboard bow, but no light was seen on board the barque, nor was any hailing heard from her; that the barque, instead of keeping her course, put her helm to starboard at the same time that the ship's helm was put to port, which brought the barque across the

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*Immaganda
Sara Clasina.*

MAY 14. ship's bows, doing her considerable damage; that the ship was towed into Portsmouth harbour on the 20th; and that the collision was wholly attributable to carelessness or want of skill on board the *New Forest*, in starboarding her helm instead of keeping their course.

Immaganda
Sara Clapina.

The Court was assisted by two Elder Brethren of the Trinity House.*

May 1.

Dr. Addams and *Dr. Twiss*, for the barque; *Dr. Jenner* and *Dr. Bayford*, for the Dutch ship.

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JUDGMENT.

DR. LUSHINGTON.

The proceedings in this case originally commenced by an action of damage being brought by the owners of the *New Forest*, a barque of 157 tons, against the *Immaganda Sara Clapina*, a Dutch ship of 769 tons, followed by a cross action. The barque was on a voyage from London to La Plata; the Dutch vessel from Batavia to Amsterdam; one was coming down the Channel, the other up. The collision took place in the Channel on the 19th January, about five leagues from the Isle of Wight, and about half-past seven o'clock in the evening. At that time, the barque was standing to the W.S.W., close-hauled on the starboard tack, the wind blowing fresh from the N.W. The night was not particularly dark; vessels could be seen at the distance of about a quarter of a mile. At the same period, as is alleged, the Dutch vessel was descried about two points on the barque's weather bow. The Dutchman was coming up Channel, on the larboard tack, steering about N.E. There is no essential difference as to the quarter whence the wind blew. The Dutch vessel was going free.

Under these circumstances, what ought to have been done by each vessel respectively is abundantly clear, provided, of course, that nothing occurred to render the ordinary rules of navigation impracticable: it was the duty of the *New Forest* to keep her course; of the Dutch vessel, to port her helm and give way. The *New Forest* starboarded her helm; and one question is, whether she was justified in so doing,

* Captain Hayman and Captain R. Gordon.

and departing from the general rule of navigation. It is alleged that the necessity did occur, and that the helm was starboarded only to avoid a collision that would have been more destructive, and that such necessity was occasioned by the delay of the Dutch vessel in porting her helm.

Certainly, if such a necessity did exist, no doubt can be entertained that the starboarding the helm was justifiable, for it is a mere truism to say that no man is bound by a technical rule to submit to the destruction of life and property; but the *onus probandi* is upon the party so deviating from the general rule, and the question here is, whether there is any proof of the necessity; and this is a question of evidence, and it necessarily includes the evidence on both sides.

It does not appear from these proceedings who was in charge of the *New Forest* at the period in question. The master was below; no mention is made of the first mate in any part of the proceedings; the second mate was at the helm; the carpenter, Adamson, keeping a look-out. I must presume, or rather conjecture, that the second mate was in charge, though at the helm. It appears that some one of the watch descried the *Immaganda Sara Clasina*, and that the carpenter held up a signal-lantern, and that they all hailed the ship to keep clear, which brought up the master and rest of the crew of the barque. It is said that the Dutch ship did not port until within a cable's length of the barque, and that then the carpenter (not the master) ordered the helm of the barque to be starboarded.

This case was heard before Trinity Masters, and I went out with them for the purpose of consulting what would be the right judgment to give. The Trinity Masters and myself concur in opinion that this measure of starboarding the helm of the barque was erroneous, and not justified by the circumstances of the case, even upon the statement of the barque herself. The barque ought to have kept her course, or ported her helm, in which case, even at the distance stated by the barque when the ship first ported, in all probability, no collision would have taken place. The barque, therefore, was to blame.

MAY 14.
—
Immaganda
Sara Clasina.

MAY 14.

*Immaganda
Sara Clara.*

But there is another question, namely, whether the Dutch ship was also to blame; whether, though she pursued the right measure in porting her helm, it was not done too late, either through an insufficient look-out, or some other cause.

The Court is greatly indebted to the Trinity Masters for the strict attention they paid to this question, and for the

Difference
of opinion be-
tween the Tri-
nity Masters.

candour with which they declared their opinion. It has happened, as must occasionally occur, where honourable men have to form opinions upon difficult questions, that they do not agree. One gentleman is of opinion that there was an unnecessary and blameable delay in porting the helm of the ship; the other thinks that no such delay is proved. My first impression was, that there must have been some negligence or delay on the part of the ship; but, having carefully and painfully reconsidered the case, I have satisfied my mind that there is no adequate proof of any

The barque
to blame.

culpable delay on the part of the ship. I must, therefore, pronounce that the barque alone was to blame for this collision. I think that the collision arose from the mistake of Adamson, in ordering the barque's helm to be starboarded, and that the ship did port her helm in time to have prevented a collision if the helm of the barque had not been starboarded. The ship came round from N.E. to S.E. and exhibited a light on her larboard bow.

Proctors:—*F. Clarkson*, for the barque; *Rothery*, for the ship.

END OF EASTER TERM, AND OF THE SITTINGS
AFTER TERM.

Admission during the Term:—

AS PROCTOR.

April 15.—*EDWARD WILLIAM TOLLER, Esq.*

SUPPLEMENT.

SUPPLEMENT.

High Court of Admiralty, Ireland.

APRIL 20, 1849.

THE "HEBE" (Goos).—*Libel*.—This was a cause of salvage, promoted by Richard Edwards, commanding officer of the coast-guard, stationed at Ballycotton, in the county of Cork, on behalf of himself and the boat's crew acting under his orders; and also by the registered trustees of the steamer *Sabrina*, of Cork, and by the master, officers, and crew of the said steamer, for alleged services rendered to this vessel, in getting her out of Ballytrasna Bay, an open, rocky, and exposed place, and towing her to Cove Harbour, upon the 27th of December last.

Salvage. — Services of a very meritorious character rendered to a foreign ship in great peril.

To this *Libel*, exhibited 5th February, 1849, a matter contrary and defensive was pleaded on the 5th of April following, setting forth in substance the ability of the *Hebe* to have extricated herself, by ordinary means and the exertions of her own crew; the small amount of salvage service rendered; and making a tender, upon the Acts, of £50 to the coast-guard, and £250 to the trustees and master and crew of the *Sabrina*.

An Interventional *Libel* was also exhibited on the 23rd of March, upon the part of Messrs. Pandia Balli and Eustratio Balli, trading under the name and style and firm of Balli, Brothers, London, as holders of a bottomry-bond to the amount of £1,850. 6s., which had been executed by Gustaff a Goos, the master of the *Hebe*, in favour of Thomas Balli, of Constantinople, for so much money, including maritime interest, advanced by him, on the 21st of October, 1848, O.S., to the said master, on bottomry, the *Hebe* being then at that

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port, and laden with a cargo of wheat, destined on a voyage from Odessa to Cork or Falmouth, for orders, and the master being without funds or credit.

The execution of this bond to Thomas Balli, and his indorsement of it to the Interveniens, were admitted on the Acts of Court, and, subsequently, an affirmative issue was entered to those articles of the Interveniens' Libel which alleged the other matters in the case.

The value of the ship and cargo was taken at £4,000; the tender of £300, which had been offered, was rejected.

The case was argued by *Dr. Radcliffe*, *Dr. Townsend*, and *Dr. Butt*, for the salvors; *Dr. Kelly* and *Dr. Gibbons*, for the holders of the bottomry-bond; and *Dr. Gayer* and *Dr. Hayes* for the owners.

JUDGMENT.

DR. STOCK.

The facts of this case appear to me to be of a strong and well-defined character, and little liable to misrepresentation, and the Court, therefore, does not find much difficulty (by the light of those facts) in assigning to the salvage services rendered to the impugnant ship the *Hebe* their proper rank and place in the scale of such merits, as that scale is now pretty well adjusted by a very long and numerous series of reported cases.

Value of cargo
and vessel.

There is at present in the Registry of the Court, subject to adjudication, in this cause, a sum of £3,000, being a portion of the proceeds of the sale of the cargo of the *Hebe*, and there is £960, the estimated value of the *Hebe*, making together £3,960. Large disbursements have besides been made (and I believe very properly made) out of the property, by the Marshal, towards the necessary and unavoidable expenses of unshipping a part of the cargo of corn at Cove; also in the storage of the corn, and afterwards in the applying of those processes for the preservation of the damaged grain, without the prompt and effectual employment of which the goods must inevitably have been a total loss. These disbursements, though extremely heavy and onerous to all concerned, are not more than were indispensable; and, as the immediate effect of the strenuous course

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of operations resorted to for the securing of the cargo was a benefit not merely to the owners and creditors, but also to the salvors, I think, according to the practice established here, these expenses ought to be borne according to a fair proportion by the salvors, in common with the owners: making just allowances, therefore, I have to observe that the fund equitably subject to the demand of the salvors is not less than £4,000; that is the *minimum*, and is indeed a calculation founded on a liberal consideration of the circumstances of the property, and indulgent towards the part of the owners. It is totally unnecessary for me to remark that some debts and liabilities, which appear to be liens on the ship and cargo, and mentioned in the course of the Argument, are of a nature not to be at all brought into account, when we are measuring the amount of the fund justly chargeable to salvage. Of such nature is the bottomry-bond for £1,800, which was given by the master of the *Hebe* at Constantinople; such also are the debts contracted on account of provisions, or other necessities, for the crew, in Cove or Cork, or the sums which may have been taken up on credit to supply these Swedish mariners with the means of returning to their country. Such liabilities form no just or fair item of deduction from the gross amount of the fund properly and originally liable to the claims of the Promovents in the salvage cause; for the salvage in question has been the very means, under the direction of Providence, that any such value is now forthcoming for the satisfaction of these debts of the owners; debts in so high a degree obligatory on their faith and conscience.

Taking into consideration, then, that the fund affected by the salvage claim is, upon a moderate estimate, £4,000, I am to decide whether the two several tenders made in the Acts, on the part of the *Hebe*, in satisfaction of the services rendered by Edwards and the volunteer fishermen, his companions, and in satisfaction of the claims of the Cork Steam Company and Captain Parker, are respectively adequate and sufficient tenders. The tender to Edwards and his company is £50, and the tender on foot of the services of the steamer amounts to £250. If the Court were to rule that

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Considerations with regard to the tender.

either of these tenders had been a good and sufficient tender, that decision would bar and extinguish the claim of salvage persisted in after the tender made, in so far as regards the party to whom such adequate and sufficient tender had been made. And if the Court ruled that each tender was good and sufficient, then the whole claim for salvage, as libellate, including both the share of the steamer and the share of the whaler, would be barred and extinguished; and the parties respectively persisting in the suit, after such adequate and sufficient tender made, would be entitled to no more than the amount of the sums lodged under the tenders, and would moreover be subject to the costs of the suit since the day of the tender. On the other hand, a tender, though it may be finally overruled, as insufficient, is always an act discovering, to a certain extent, good and sincere intentions on the part of those who make it. It operates as an admission of merits, and is so far evidence of fair dealing and candour, as well as of a sense of gratitude on the part of those who thus evince the purpose of accepting a real service in an amicable spirit. Accordingly, whenever a tender is not illusory,—is not so much below the true merits of the claimant as to be transparently a mere pretext,—it ought not in my judgment to operate unfavourably to the case of the impugnant; but, on the contrary, I am disposed always to deal with *bona fide*, though inadequate, tenders, as important indications even in respect to the substance of the case.

History of the case.

The facts of this case may be briefly summed up. The *Hebe* is a barque of about 500 tons burthen, belonging to the port of Bjornëburg, in Russian Finland, situate on the coast of the Gulf of Bothnia. She had made the longest voyage which, within the limits of Europe, it is perhaps possible for a ship to do, that is, from a port in the Gulf of Bothnia to Odessa, on the shores of the Black Sea, at the mouth of the river Borysthènes. At Odessa she took on board a cargo of wheat, and proceeded on her return voyage. Early in the course of the return she was destined to suffer a beginning of misfortune, for, in the port of Constantinople (I presume owing to the casualties of the outer-

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v

bound voyage, or to some accidents in the run from Odessa), the *Hebe* was obliged to undergo repairs, and to that end took up a large sum on bottomry. She now prosecuted her voyage, bound in the first instance for Cork or Falmouth, to receive ulterior orders at one or other of those two ports. Having been for some time on the coast of Galicia, in Spain, not without some further disastrous experience of the perils attendant upon her circumnavigation of the European continent, at length, about the 22nd of December, 1848, she made the Agnes light, in the Scilly Islands, then distant sixteen miles, and bearing east quarter south. She was at this time in the chops of the English Channel, endeavouring to beat up against baffling winds, so as to make the port of Falmouth; but, however it happened, she failed in gaining that port, and her master, M. Goos, took the resolution of putting the vessel's head about, and bearing for Cork, the wind having set in from the eastward and southward, and, therefore, rather favouring a run for Cork. Three days after, on Christmas day, the *Hebe* came in sight of the lights at the entrance of Cork harbour, bearing five miles distant, at eight o'clock in the evening. The weather had then become very bad and foul, the wind continually increasing; and it is little to be wondered at, therefore, if, so late in the evening, and particularly on Christmas day, they had the misfortune to miss of a pilot. Captain Goos, as a stranger to the coast, declined the risk of attempting to enter the harbour in the dark, and, there being now a hurricane of wind, he reefed his sails, and endeavoured to preserve himself during the night, beating off the land. A south-west wind, however, carried him forcibly past Bere Head, towards a very inhospitable shore and a most dangerous locality, eastward of Bere Head, and between that point and the point of Ballycotton Island. It is a place called Ballyandrina, a circumflex or indenture of the coast, called by courtesy a bay, but in fact an open and exposed shore, full of sunken rocks and reefs, and totally destitute of shelter or safe anchorage. On this part of the coast, described as the wildest creek in the county of Cork, and about a mile and a half west of Ballycotton Island, the *Hebe* was driven in the course of the

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forenoon of the 26th of December. She had been for several days before in a leaky state, and water was making fast in her hold. The weather was at this juncture most tempestuous, and under her lee was presented an ironbound coast of rocks, directly down upon which the force of the wind was bearing the ship. About noon on the 26th, Captain Goos dropped both his bower anchors, but the ship dragged, and her destruction appeared almost inevitable. Her mainmast and foremast were then cut away, and this operation happily produced the desired effect, for in a few minutes the dragging began to cease, and the ship held by her anchors. Still the position of this vessel cannot be described as anything less than formidable; she was exposed to the beating of a most tremendous surge, environed with breakers and dangerous sunken reefs, and embarrassed with the wreck of her masts, spars, and rigging, which hung by her side, and, before they could be cut away and cleared off, had already caused great additional injury to the vessel, by collision, and had further opened the leaks and shaken the framework of the *Hebe*. At length they cleared away this dangerous gear, and, immediately after the wind abated somewhat, so that the first and chief salvor in this cause may truly be said to be the Providence of the Almighty, without which, escape from a most disastrous shipwreck would seem to have been almost impossible. On shore, too, appearances were equally menacing. The populace had armed themselves with hatchets and saws, and were prepared, I fear, to give the crew no very humane reception.

At this period of time, the Promovent Edwards took the initiatory measures needful towards an attempt at rescuing the lives and property involved in this state of extreme and nearly desperate peril. All the steps taken by Edwards appear to me to have been proper and judicious. He was the commanding officer in the revenue department at Ballycotton; and I should do him wrong if I did not state, that it is the decided opinion of this Court that, throughout the whole of the transactions connected with the salvage of the *Hebe*, Mr. Edwards has displayed as much cool judgment, energy, humanity, and courage, as could under the circum-

stances distinguish the conduct of any individual whatever. The precautions taken by Mr. Edwards, in sending for a steamer to Cove ; in collecting the best force of constabulary, and even of military, from the adjacent stations which he could at the moment obtain ; in the effective protection he was prepared to throw around the foreign crew, in case of their getting safely on shore ; in the prompt, and to a certain extent successful, rescue of the rafted materials which were floating in to shore, under the eye of a most determined mob of wreckers ; I say, in all these respects, but, above all, in the generous and gallant succour he was bent on giving, at the hazard of his own life, in his adventurous attempt to get out by boat to the *Hebe* ; I do, in all this discover, every characteristic of that zeal which, whenever it occurs in a case of salvage, is justly the subject of eulogium, and ennobles the records preserved in these Courts with the genuine features of humanity and intrepidity. It is said that Mr. Edwards is not a regularly bred mariner ; now if it were so, and that he were little accustomed to the face of danger at sea, so much the more would it redound to his honour that, confronting and subduing fears and apprehensions, necessarily magnified to his mind by that inexperience of their nature which all novelty implies, he was willing, for the sake of preserving the life of his fellow-man, to put his own existence in immediate jeopardy. But I see no ground for this imputation,—though I think it little material one way or the other,—on the professional skill and competency of Mr. Edwards in marine affairs. He was evidently quite able to take and hold the command of the volunteers, who on this occasion consented to go out with him to sea. He did command, and he steered the boat in his dangerous course round Ballycotton Island. It is sufficient to the Court, that it appears he was well qualified to conduct the operations which he undertook, and that, so far as knowledge in maritime affairs was necessary on this occasion, that knowledge he certainly possessed.

The wind had shifted a little towards noon, and it gradually abated from thence throughout the day and up to midnight. Captain Hore, of the Royal Navy, has stated exactly

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the variations of the weather throughout the day, and I collect from his evidence that, before evening, there was no longer any foul weather, such as to occasion danger at sea ; but Capt. Hore also distinctly admits that, though the weather was fair, the sea was not safe, the swell continued, and in the sailor's phrase, I think, Captain Hore has given decisive testimony to the fact, that, at no time before the morning of the 27th of December, could an attempt to board the *Hebe* by a row boat from the shore have been regarded as anything else than a hazardous undertaking,—his expression is this : “ he should not have liked to have been out that night in a row boat off Ballycotton Island to seaward ;” in fact, he fully admits it was a case of danger.

It is alleged by the Promovents, that the boat put off from Ballycotton Pier at one o'clock in the morning, and that they were occupied in the passage out from four to five hours. This is denied on the other side, and the matter is argued as if this were a statement in the teeth of all probability, merely for the purpose of magnifying the difficulties and hazards undergone. I find, however, that the time of the departure from Ballycotton Pier is most positively sworn to by the three men of the boat's company who have been produced in support of the Libel ; and, undoubtedly the other point of time, viz. the time of their arrival alongside the *Hebe*, is established by incontestable evidence. A little before five in the morning of the 27th they came alongside ; this the master of the *Hebe*, Captain Goos, himself admits. Now, in stating this, Captain Goos further adds, that the men in the boat, immediately on coming aboard the *Hebe*, declared that they had been five hours working out from shore, and had undergone hardship and exposure. I think this very material towards establishing the accuracy of the evidence as to time. It shows this is no afterthought, or newly made-up story, to meet hints and suggestions of professional or other advisers ; it was what the men stated and asserted at the instant. Besides, if this allegation as to the time of the commencement of the salvage were untrue and inaccurate, nothing could be more easily disproved—there were plenty of witnesses at hand. The country people, it

appears, did not disperse, at least all, during the whole night, and unquestionably Ballycotton Pier was far from being a deserted spot at the moment when the boat was launched. Can I reasonably doubt that the three salvors produced have sworn truly as to the time? Can I take them to be perjured on this matter of fact, the most readily open to contradiction, perhaps, of any one point in the case? Certainly not. I am satisfied that the *animus* of these sailors was excellent; that they were full of zeal and enthusiasm, and bent on turning to the best account the opportunities of time and weather, the moment such opportunities were first placed within their power.

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Now, there can be no doubt that this attempt of the men in the whaler is entitled to high commendation, as a bold and adventurous case of salvage. The aim, beyond question, was that high aim, the highest and purest known to the law of this Court—the desire of preserving life endangered at sea. Neither have I any doubt that the salvors knowingly put their own lives in peril, and were in the course of the passage exposed to some considerable and actual danger. And was there not a most substantial and valuable object in view, the neglect of which might not indeed be criminal, but the achievement of which was in a high degree meritorious and honourable? In my judgment, there was such an object to be gained. What was it? Why, to become the guardians of the crew of the *Hebe* against such ill-advised attempts at their own extrication as, in the circumstances of danger to them at that time unknown, but nevertheless real and on all sides surrounding them; to guard them against the attempts they would have probably entered upon, prematurely and perilously, in the hope of making the land.

It is true, I admit, and as Dr. Gayer argued, that the local ignorance of a foreign master—his want of knowledge of the coast—is no ground on which pilots or others can raise a claim of salvage; that is to say, such ignorance cannot solely and alone confer on those who come to the assistance of it, by offering the necessary advice and instructions, a right to graft thereon pretensions to the character of salvors.

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But this is only when the value of the advice given is simply and merely the value which belongs to pilotage. It is another case, if a ship be beleaguered with concealed and manifold dangers, and, by a prompt and courageous effort, information is brought out from land, in consequence of which fatal mistakes and rash counsels on the part of the endangered ship are anticipated and prevented, and the way of safety first opened to the crew. It is clear, I think, that when Edwards came up, the master and crew were already bent on preparation for quitting the *Hebe*, and for endeavouring to make the shore. It is a possible case, but not I think a probable one, that the crew might have conceived the plan of rounding Ballycotton Island to the south, in the same course which was taken by Edwards. It is much more probable that, in ignorance of this line, they would have attempted the lee shore before them; and I think, in that case, they would have been placed in a situation of the greatest danger. There was a sunken reef between them and the coast, on which I believe their long boat must have been swamped. The opportune arrival of Edwards did, as far as I am able to form a judgment, actually interpose between them and this imminent danger. I have no doubt that the deliverance which was thus accomplished was the very object in the contemplation of the salvors; and with this state of facts before my eyes, can I say that nothing was effectually done by Edwards and his companions? There are in most cases of miscellaneous evidence some indication of the truth derived from the mere light of circumstances, which are even more marking and valuable than the best direct oral testimony. Here was the long boat, when Edwards boarded, hoisted from her proper berth along decks, and put into a position denoting the intent to launch; here was a bag of biscuits evidently in readiness to stow on board this boat; and here was a mate and crew jointly and in a body remonstrating with their captain on the imminency of the impending peril, and asking as a favour that, first in order of time, and before any measures were taken for the securing of the ship and cargo, due care should be applied to the more momentous concern of saving human life; that

the boat should be in readiness first, and that then, with a reasonable alacrity (their own safety being provided for), the crew would go to work in performing their duties towards the property.

From five o'clock in the morning till about eight or nine, Edwards and his party were assistant to the crew of the *Hebe* in the labour of heaving the anchors. I do not pass over the risk and inconvenience sustained by these hardy and enterprizing men in boarding the *Hebe*, and I see abundant matter to applaud the untiring energy and intrepidity with which they encountered every difficulty. At nine, whilst considering of the measures to be taken to move the ship from her very unpleasant situation,—whether by a jury-mast, or by towage, or both together,—they were suddenly relieved from all further care by the appearance of the *Sabrina* steamer, under the orders of Captain Parker, which at that time hove in sight, rounding Bere Head. This is a powerful steamer, of the value of £23,000, in the service of the Cork Steam Company. She was bound to Bristol, with a cargo worth more than £2,000; a crew of twenty-five hands, and three cabin passengers. She left Cork that morning, about six o'clock A.M. She left Cove two hours after, or at eight in the morning. At Cove, Mr. Scott came on board the *Sabrina*, announcing the intelligence to Captain Parker, that a large ship had been on the coast, near Ballycotton, but dismasted and in distress, since the forenoon of the preceding day. Captain Parker decided to repair to the spot, and make a tender of his services. This occasioned a small, and but a very small, deviation from his course. At ten o'clock, the *Sabrina* neared the *Hebe*; the steam was slowed, and Captain Goos, accompanied by Mr. Edwards, went to the steamer. Captain Goos, as he was in duty bound, endeavoured to place the salvage of his ship on a footing of contract; in fact, to bargain for the price of a towage service to Cork. If it was the duty of Goos to invite Parker to a negotiation, it was equally and undoubtedly Captain Parker's duty to decline being bound by any specific agreement. Clearly, the situation was not such as left an option of treating to Goos. Mr. Edwards

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put the matter in its true light; he said to Goos, "You must accept unconditionally; it would be madness in you to refuse the offer of the steamer's service." Goos, in fact, like a well-advised master, at once capitulated; he saw there was no room for parley. Captain Parker's service being thus unconditionally accepted, he backed the steamer towards the *Hebe's* bows. The reason of manœuvring in this way was, that the distance between the *Hebe* and the rocks adjacent to the Island of Ballycotton was considered to be too small to allow of the *Sabrina's* passing under the stern of the *Hebe* between her and the rocks, and so coming round to a proper towage position ahead of the starboard bow of the *Hebe*. This would have been the proper and usual method of proceeding to throw the towage-line and to link the ships; but a somewhat hazardous course was of necessity adopted on this occasion, by backing the *Sabrina* to the *Hebe*, in a very rough and swollen sea. However, the towage-line was of great length, and it was carried aboard the *Hebe* in the boat. With such a seaman as Capt. Parker on board the *Sabrina*, I do not think any of the passengers need have been under the slightest degree of alarm as to the consequences of this manœuvre. The *Hebe*, being attached, was then towed safely to Cove, where they arrived in the course of the same afternoon.

I am to observe that, so early as five o'clock that morning, the *Hebe* had eleven or twelve feet of water, and when arrived in Cove, not less than fourteen feet of water in her hold. Already, when she reached the quay of Cove, much damage had been done by the salt water to the cargo of wheat. In prudence, not a moment of time was to be lost in beginning to unlade her, and so urgent was the necessity deemed, that in a very few hours after her arrival they ran her aground, adopting that expedient expressly for the purpose of saving the cargo. In the course of the towage, the tow-rope burst; it was a new and valuable rope, worth from £25 to £30, and for this compensation is claimed. The rope appears to have been much strained and injured, besides the damage done by the rupture. I have further to observe that the towage was, though not accompanied with

danger or labour, still a tedious and troublesome work. The *Hebe* lay deep in the water, and was from her dismasted state, and the water in her hold, rather a difficult job for towage. Besides this, Captain Parker lost his voyage, and incurred a demurrage of twelve hours on the Irish coast, and twelve hours more at the mouth of the Nore.

There is a question raised whether the steamer was brought up to the assistance of the *Hebe* by means of the agency of Mr. Edwards, or whether her arrival is not to be attributed to the general rumours current at Cove, of a wreck being at Ballyandrina, without any certain author. There is some importance, I admit, though not perhaps a very great importance, to be attached to the decision of this point. Something is wanting to complete the chain of evidence, which, if Mr. Scott had been examined as a witness, would have probably been cleared up. Still I think the Court is justified in believing, upon the fair import of the facts in evidence, that the application of Mr. Scott for the assistance of the steamer was the direct consequence of the message sent by Edwards to the Receiver of Droits at Cove. That a message was despatched to Cove, by Edwards, to the Receiver of Droits there, in the course of the afternoon of the 27th, is certain. Now observe that Edwards, in the course of that afternoon, had secured the rafted materials cut away from the *Hebe*, which he found floating in the Sound of Ballycotton, which he then moored, and which remained under his custody *in usum jus habentium*. Now, under these circumstances, the Wreck and Salvage Act, 9 and 10 Vict., c. 99, by very express words, and under a very heavy penalty, imposed on Edwards the duty of immediately apprizing the Receiver of Droits at the nearest station of these facts. He was subject to a penalty of £50 in case of neglecting this duty, and stringent provisions are added to enforce upon the Receiver prompt attention to such communication. Then, the period of time is short between Edwards's message and the arrival of the *Sabrina* at Cove,—only the interval of the intermediate night. Thus there are duties imposed by the Statute both on Edwards, as the revenue officer, and upon the Receiver of Droits, to act in

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this emergency ; and I think I can hardly imagine it probable that any mere rumour, in so short a time, could have forestalled the diligence of these officers, acting in their sphere of duty, and that it would be a forced inference to suppose that Mr. Scott did not act in consequence of intimations conveyed through the proper official channels. I think the evidence fully sufficient to bear out my inference, and to warrant me in acting on the ground that Mr. Edwards is, in this part of the transaction, as well as in the rest, the *dux facti*, under whose careful and well-considered conduct, this honourable service was begun and brought to a successful termination.

Case of effective salvage.

Such, as I have now briefly rehearsed them, are the material facts constituting the history of this case. They are facts, I repeat, of the most unequivocal and characteristic nature. Not a doubt can remain of this being a complete deliverance of a ship and cargo, by the instrumentality of the salvors, from a situation of multiplied and most embarrassing difficulties. Without the timely arrival of the whaler and her company, there is every reason to suppose the *Hebe's* crew would have committed themselves to the desperate chances of an attempt at landing, and, without the arrival of the steamer, every probability leads me to believe that the measure adopted would have been to get the ship round to Ballycotton Pier. Consider, in this event, the great loss that must probably have fallen on the cargo. Even at Cove and at Cork, with all the mechanical appliances and all the resources of skilled labour at command, in a commercial emporium, much injury and loss was incurred by the progress of the salt water in tainting the grain. Now, clearly, if she had gone to Ballycotton Pier, either they must have sent to Cove for a steamer, with a ruinous delay in the interval, or they must have attempted to unlade the cargo in that remote and sequestered village. Even laying aside the consideration of the plunderers along the coast, I cannot but conclude that what would have been called the salvage of the ship, in Ballycotton Bay, would have been in truth no salvage at all, at least so far as regards the value of the corn. I conceive, therefore, that it is fairly inferable

from the evidence, that to the acts of the salvors in this cause is due completely the rescue and realization of the value which has been made available by the sale of the cargo, and that, without the services rendered, there would at this day be no such value extant at all.

Such being the conclusion to which my mind is irresistibly impelled by the evidence, I have not the slightest doubt about overruling the tenders, both the one and the other of which I deem to be inadequate and insufficient. At the same time I am sure those tenders were made in perfect good faith, and as in a choice of difficulties, and they have not been without a certain degree of influence in guiding the Court.

Here, then, on the one side, is a case of salvage which, as a case of deliverance effected, is highly meritorious. On the other side, the property subject to adjudication is not great; the losses and sufferings of the owners in the late disastrous voyage have been great and lamentable. So far as the steamer *Sabrina* is concerned, no extraordinary claim of merit, other than that of a most opportune tender of assistance, can be advanced. On the part of Edwards and his company, there are resolution, gallantry, enthusiasm, and the glorious probability that they have been the saviours of life. But independent of the excellence of their intention, it does not appear that Edwards and his men had to encounter any very great degree of hardship; it was chiefly the risk of their run to the *Hebe* at night, before the sea was fully returned to calm, which distinguishes their exertions from common cases. While, then, I have no doubt that I must considerably increase the salvage reward beyond the amount of the tender, I must also carefully guard myself from allotting any excessive sum against the *Hebe*, under the influence of those feelings, towards the salvors, which their great respectability induces.

I have carefully considered the cases cited in Argument with respect to measuring the quantum of the salvage. It is truly remarked by Dr. Lushington, in the case of the "*Genessee*,"* that it is hardly possible to make a precedent

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of any one case in deciding any other, when the question is the question of money compensation; so infinitely various are the shades of difference which result from the comparison of the details of each particular case with another. I have, however, done my duty to the best of my power in analyzing the different reported cases.

Allotment and
 apportionment.

Upon the whole, taking the sum of £4,000 as the fund, the Court decides to allot for the whole salvage £450. Of this sum, £330 is to be the share of the steamer, and £120 is to be paid to Mr. Edwards and those who went with him in the whaler. Of the £330 allotted to the *Sabrina*, the Company is to have £30, the price of the ruptured cable, and £150 as share of salvage. To Captain Parker I allot £75, and to the crew of the *Sabrina* £75, to be distributed on a scale measured by their rates of wages. To Mr. Edwards £50 for salvage, together with his disbursements on the occasion of the salvage. The remainder of the £120 to be divided equally among the eight.

Costs of suit to all the Promovents.

(The Court subsequently decreed for the amount of the bottomry-bond, together with interest, at the rate of four per cent., from the day of its having become due; and costs.)*

Proctors: *Hamerton*, for the Promovents; *Richardson*, for the Intervenients; *Anderson*, for the Impugnants.

* The Editor is indebted for this Report to the kindness of Dr. Kelly.

Supreme Court of Judicature, Bombay.

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MACLEAN v. CRISTALL.—This was a special case arising out of an action brought by Major Archibald Neil Maclean, of the 8th regiment of Native Infantry of this Presidency, against Captain Francis Cristall, of the same regiment, to recover damages from the defendant for criminal conversation with Mrs. Maclean, the wife of the plaintiff. The defendant had pleaded that the said lady was not at the time married to the plaintiff, the ceremony having been celebrated by a Congregationist or Independent Missionary, not in Holy Orders. Issue was joined by consent of the parties, and the point was brought on for hearing.

It appeared that, on the 6th November, 1834, a ceremony of marriage took place between the plaintiff and Miss Mary Levis Pelly, at the city of Surat. The plaintiff was of full age, and had a captain's commission in the 8th regiment of Native Infantry, Bombay army. At the time of the marriage, Miss Pelly was under age, and had for some time previously been living with her father, at whose residence the marriage took place; and it was with the father's consent. The parties to the marriage were both members of the Church of England, according to the rites of which Church the ceremony was performed by a Rev. Mr. Fyvie, who had not been ordained episcopally, but belonged to a sect called Congregationists, or Independents; and in the Register of the marriage he described himself as "a Minister of the Gospel and a Missionary." No person in Holy Orders was present at the marriage. There was at that time a small military force at Surat. Previously to the marriage, there had been a Protestant Church erected there, to which a Chaplain of the East-India Company, episcopally ordained, had been regularly appointed to do duty. The last chaplain had relinquished the appointment in 1831. The nearest Clergymen at the time of the marriage were then residing at Ahmedabad, Poona, and Bom-

A marriage between British-born subjects, natives of Europe, members of the Church of England, celebrated at Surat, by a "Minister of the Gospel and Missionary," not in Holy Orders, belonging to a sect called Congregationists, or Independents, no person in Holy Orders being present at the marriage,—held to be valid.—That portion of the Common Law, requiring the presence of an ordained minister at a marriage, was never introduced, and does not now exist, in India.

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bay; though there was a Roman Catholic Chapel at Surat, and Priests were living there. Mr. Jackson, who was, immediately after the marriage, appointed Chaplain at Surat, was a Clergyman of the Church of England. After the marriage, the parties cohabited as man and wife, and were received as such by their relations and friends.

The question for the Court to decide was—whether these facts constituted a valid marriage, as stated in the plaint. This decision was to be without prejudice, in either case, to the right of either party to appeal from that decision to Her Majesty in Council.

The question had been submitted to Mr. Howard, to Mr. George Turner, Q.C., and to Dr. Addams, and they were of opinion that the marriage was illegal; expressing, however, some doubt upon the subject.

The question was argued and re-argued before a full bench; *Howard*, for the plaintiff; *Dickinson*, for the defendant.

THE COURT took time to draw up its judgment, which was delivered by

JUDGMENT.

SIR T. ERSKINE PERRY, C. J.

The question which has been raised in this case, respecting the validity of the marriage of Major Maclean to Miss Pelly, the daughter of a gentleman in the Bombay Civil Service, is one which has been foreseen by jurists, ever since the decision of *the Queen v. Millis*,* as certain to arise in this country, sooner or later.

The argument raised at the Bar was, that the above decision has established that, by the Common Law of England, a valid marriage can only be solemnized in the presence, and by the intervention, of a minister in Holy Orders; that the Common Law of England is the law of this country, so far as respects Europeans; and that, as the marriage in question had been celebrated at Surat by a missionary minister, who had not received Episcopal ordination, it necessarily followed that the marriage was null and void.

* 10 Cl. & Finn., 534.

And, if the premises in the above argument are valid, the conclusion urged upon the Court appears irresistible. But as the effect of such a conclusion would be to pronounce a vast number of marriages that have taken place in India, during the last 250 years, invalid,—to extend the stain of illegitimacy to many a pedigree hitherto deemed spotless, and above all, to carry terror and dismay into numerous innocent and unsuspecting households,—it behoved the Court to be very well assured in their convictions, before they could venture to emit a decision fraught with such stupendous and deplorable effects. To motives such as these for investigating deeply into the principles of English law, it may be added that a love for the science, and a regard for the credit, of English jurisprudence, which may be avowed without reserve by its professors, have led to a more anxious and pains-taking inquiry, on the part of my learned brother and myself, than I ever recollect to have applied to any judicial inquiry. For it must not be omitted to state, that the question which has arisen now could not have arisen if the jurisprudence of any other nation of Europe had been applied to India. With respect to our European predecessors in this country, if our present empire had been possessed by the Catholic Portuguese, the Canon Law of Europe would have declared this marriage legal. And so also with the Civil Law, which the Protestant Dutch introduced into all their conquests. Indeed, if another member of the British Islands, Scotland, instead of England, had given its personal laws to India, the present difficulty would never have occurred.

The consequence in question, therefore, if it flows from the principles of English law, is evidently attributable to some unbending peculiar institute, not traceable in other systems of jurisprudence. After the most careful research through our judicial records, I have completely satisfied myself that the English law, however insular in its character, and unplastic in its powers of adaptation to extended empire, as compared with other systems, contains no such rigid doctrine ; and that, on the contrary, the fund of good sense which is contained in the most valuable collection of

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jurisprudence in the world,—I mean the English Law Reports,—furnishes forth ample authority for denying a rule so inconvenient to mankind as has been alleged at our Bar to exist.

It must be assumed, however, in this argument, that the major proposition enunciated above, as to the invalidity of a marriage, by the Common Law, without the interposition of a priest, is incontrovertible. But even on this point the state of the law is so remarkable, and stands, if I may be allowed the expression, on such unstable foundations, that it is impossible to avoid briefly adverting to it.

From the year 1754, the Common Law of England, as to marriages, was abrogated in England itself; and the municipal regulations introduced by Lord Hardwicke's Act* from that time constituted the law of England. The Common lawyers of England, therefore, during the last ninety years, have had very rare occasions for considering what the common or ancient law as to marriage was; although, as the Common Law still prevailed in Ireland, in America, in numerous colonies, and in India, it sometimes became necessary to pronounce opinions on the subject. But during the whole of the last century, and the greater portion of the present, the opinion almost universally prevailed amongst the profession, as well as amongst the public, that although marriage was not merely a civil contract, still, when the natural and civil contract had been formed, it contained the full essence of matrimony, without the intervention of a Priest; and Lord Stowell, in 1811, embalmed this doctrine in decision, when he delivered his profound and masterly judgment in the case of the *Dalrymples*,† which apparently settled the law on this subject for all time to come. But in 1826, an ingenious barrister, in editing a new edition of a law treatise,‡ appended a very able note to the chapter on marriage, in which he contended that, by English law, the presence of a Minister in Holy Orders was absolutely essential to constitute a marriage. The speculation remained unheeded in practice till the year 1842, when, a man named Millis being

*The Queen v.
Millis.*

* 26 Geo. 2, c. 33.

† 2 Hagg. C. R. 54.

‡ Jacob's Ed. of Roper's Law of Husband and Wife, 2 vol. p. 445.

indicted for bigamy at the Antrim Assizes, his Counsel took the objection that the first marriage was void ; for that Millis, being a member of the Church of England, had been married in Ireland by a Dissenting Minister, viz. by a Presbyterian. The objection was solemnly argued before the Irish Court of Queen's Bench, when two judges thought the first marriage a good one, and the other two thought it bad ; but in order to pronounce a decision, and thus to allow an appeal to the House of Lords, one of the judges, who deemed the marriage good, withdrew his opinion, *pro formâ*, and thus, a majority of the judges having been obtained, the objection prevailed, and the prisoner was acquitted. The appeal to the House of Lords having been lodged, the opinions of the English judges were requested ; and they, after considerable fluctuation in the minds of some of them, finally gave their unanimous opinion, that, by the Common Law of England, a marriage was not full and complete unless made in the presence, and with the intervention, of a Minister in Holy Orders. But as the learned judges were then about to leave London for their circuits, they were not able to write out the reasons of their judgment *seriatim*, or to notify to the superior tribunal the mode in which their doubts had been surmounted, with the exception of Chief Justice Tindal, who, in delivering the joint opinion, subjoined the reasons which had operated on his own mind.

With this instruction, the case came on for argument at the bar of the House of Lords, and it may safely be alleged that no case of modern times has called forth a similar display of legal acumen, deep research, and philosophical argument, both at the Bar and on the Bench. When the period arrived for giving judgment, Lords Brougham, Campbell, and Denman pronounced most elaborate judgments in favour of the marriage ; Lords Cottenham and Lyndhurst pronounced equally elaborate judgments against it ; and Lord Abinger (the only other law lord present) voted in conformity with the opinions of the English judges. These noble lords being thus equally divided in opinion, the decision of the House of Lords, by a technical rule, was held to be in favour of the Court below, and that Court, as has

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already been shown, had only come to any conclusion at all by way of arrangement.

In this extraordinary conflict of opinions, it would be extremely unbecoming in an inferior tribunal to attempt to hold a balance between such distinguished living authorities, although with posterity it is an office which any Dupondius may assume without presumption. But on reading the admirable judgments of Lords Brougham and Campbell on one side, and of Lords Cottenham and Chief Justice Tindal on the other, it is impossible to help perceiving, amid such nicely-balanced arguments, that a sufficient legal basis existed for a conclusion on either side. And it is, perhaps, permissible to express a regret that, when the Chancellor and Lord Chief Justice felt themselves compelled, by the rigour of their logic, to adopt a principle which they recognized with regret, and the mischief of which they did not fail to acknowledge, they had not adverted to the example of their great masters in law, the classical Roman jurists, who, when they found that propositions and *dicta* laid down in early times led to conclusions opposed to the best interests of the Commonwealth, vigorously appealed to the foundation of all human law,—common sense,—and on the well-received maxims, *utilitatis causâ* and *jus singulare ad consequentia non producitur*, they rejected the consequences, and promulgated a rule in harmony with the welfare of mankind.

The termination of the case in the House of Lords, however, in the manner above noted,—although possibly that noble tribunal may still consider the question open, if it should be again brought before them,—in the mean time, and for all inferior Courts, appears to impose the rule as to marriage in the terms laid down by me above. It should at the same time be observed, that a great Ecclesiastical Judge, Dr. Lushington, who is profoundly versed in matrimonial law, has treated the decision of *Queen v. Millis* as if the law deducible from that case was not yet to be considered thoroughly established.*

* *Catterall v. Catterall*, 1 Robert. 304. 4 Notes of Ca. 222.

Upon this rapid review of the authorities as to the state of the Common Law at the present day on the question of marriage, it cannot be denied that the rule which must now be considered to be in force has extremely little about it of the characteristics which ought to distinguish a law that comes home so closely to the business and bosoms of mankind. The difficulty of applying such a rule, therefore, to India, where on nearly every occasion the applicability of English Law in all its terms is beset with thorns, becomes considerably enhanced. As a general principle, it may be taken that the British in India are all deemed to have an English domicile. The authorities for this position are collected in Mr. Jacob's Note, in 2 *Roper*, p. 460; and in the Supreme Courts of this country the doctrine is always acted on. By the rule also which applies to Europeans visiting the factory of another European power, in which case the stranger takes his legal character from that of the power to which the factory belongs, or by the more general rule which prevails amongst European nations as to *lex loci*, the English law generally is the law of all Europeans who come within the British dominions in India. But with respect to the introduction of English Law generally into this country,—the time when, the mode how, and the extent to which, it has been imported,—all these form questions of the greatest legal difficulty, and they have afforded subjects of continual controversy in all the Courts of the Crown since their first establishment. The difficulty has chiefly arisen from the anomalous character of the British settlements in the East. The Common Law of England lays down ample rules with relation to factories in foreign countries, to plantations in uninhabited countries, to cessions or conquests from European powers. But the British possessions in India are none of these, but an Eastern densely-peopled empire, subordinate to a distant Christian power, and accordingly the rules derivable from relations between the metropolis and her colonies, or even from the international law of Europe, are often found wholly inapplicable to this new great fact in the world's history. In the slow and sometimes imperceptible process by which the British

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power in India has attained its present magnitude, it may be observed that all the various modes by which a foreign country becomes predominant abroad, have co-operated to create our present empire; and that factories permitted by the Mogul; settlements connived at by subordinate rulers; and cessions and conquests from European as well as native powers, have all afforded centres from which British dominion has been enabled to radiate. Such a wonderful phenomenon as this state of circumstances presents could of course not be foreseen by legislation; and the natural result has been, as in all cases unprovided for by law, that institutions sprung up and became established as they were severally called for by the exigencies of the case. It is the business of lawyers, in after-times (and their industry and astuteness can never be more beneficially employed), to bring all the facts, institutions, and regulations, which they find thus established, within the domain of law; and, by applying the various principles which they find scattered through their jurisprudence, to place on a legal basis all such as they ascertain to have been demanded by necessity, and to be warranted by reason. The broad fact, with respect to English law at the present day, is, that however variously introduced into India, and at whatever periods, it is now the dominant law throughout the British possessions for all those inhabitants who belong to the European family of nations. For reasons which I have given at length in the case of *Perozeboye** (printed in Mr. Morley's Digest), as to the European character of the doctrine of *Lex Loci*, I feel compelled to state the proposition in the above qualified form.

Extent to
which the Eng-
lish law has
been intro-
duced there.

But the next step of the reasoning, as to the extent to which the English law has been introduced into India, is the point on which the judgment in the present case must depend. The rule on this subject is afforded by the doctrine of the Common Law with respect to colonies, which, though not strictly analogous, is more in point than any of the other rules in our law books. The rule in such case is,

* *Perozeboye v. Ardaseer Cursetjee*; Sir T. E. Perry's Notes, Ca. 10; 2 Morley's Digest (App.), p. 335.

that although colonists take the law of England with them to their new home, they only take so much of it as is applicable to their situation and condition. In many cases no question will arise as to the inapplicability of several provisions of English law, which are clearly seen to be merely municipal; but whenever a question does spring up, it must be decided, like other disputed points of law, in the Law Courts of the country. Blackstone lays down the rule very authoritatively on this subject: "What shall be admitted and what rejected, at what times, and under what restrictions, must, in case of dispute, be decided in the first instance by their (the colonists') own provincial judicature, subject to the revision and control of the King in Council."*

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Nor, with all the sarcasms which in later days have been thrown (and in one sense justly thrown) on what is called Judge-made Law, can it, I think, be denied, that within these limits the discretionary power here adverted to, when exercised under the checks of public opinion, mature deliberation, an independent highly educated profession, and a conscientious desire on the part of experienced men to educate the rule of law most consonant with the welfare of society, is the true source from which the better as well as the greater part of English law has proceeded.

This rule has been continually and necessarily acted upon by the Judges in India since the first establishment of the Crown Courts; and with the fluctuation of opinion which was necessarily to be expected, and which it is indeed desirable should exist, whilst the slow process of argumentation founded on wide views of facts is going on, the Indian law books will be found full of reports in which judicial determinations have been obtained as to the applicability or otherwise of numerous portions of the English laws to India. But more recently the same question has been raised in the highest tribunals in England, and the Profession in India has the satisfaction now of knowing that they are proceeding on sound doctrine when they seek to apply the rule in question.

* 1 Comm. Introd., sect. 4, 108.

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Those great Judges, Sir Wm. Grant, Sir Thomas Plumer, and Lord Lyndhurst, have all recognized the validity of the principle; but the greatest authority on the subject is Lord Brougham, for in his judgment, in the case of the *Mayor of Lyons*,* he has gone into the subject of English Law in India more profoundly than any of his predecessors, and he has laid down conclusively, that only such portions of the Common Law have been introduced into India as were suitable to the condition of the country.

The question, therefore, which now remains for inquiry, is, whether that portion of the English Law which required the presence of a Minister in Holy Orders at the celebration of a marriage was suitable to India at the time when English Law was introduced into the country.

It clearly appears from the discussions in the House of Lords, that, in the opinion of those learned Judges who established the rule in question, the source to which such rule is traceable is a Law or Institute of one of our Anglo-Saxon Kings. Not so much by way of literary curiosity, as for the immense importance attributable to this Law, I prefer to cite it in its original language, and not in the Latin translation which was used in the Lords, and which I believe is due to Wilkins. King Edmund's Law,† which dates from A.D. 940, is as follows: "Æt þam gýran rceal mæsse-pneort beon mid rihte se rceal mid Frober bletunge heona geromnunge gebepian an ealpe gerumb fulnerre." The word-for-word translation of which is, "At the giving (betrothal) shall a Mass-priest be. With right (*de jure*) he shall with God's blessing their union bind in all sound fulness."

Now on giving the fullest effect to the words of this Law, and holding, as has been done, that they are compulsory, and not directory, it is evident that the state of circumstances to which they apply is that where a Mass-priest is available to any couple minding to be married,—to the condition, in fact, of Christendom at the period when the Law was passed. And so, when the Reformation occurred

* 1 Moo. Ind. App. 270.

† Ancient Laws, p. 109.

in England, and when, by some process not explained, but the difficulty as to which has been pointed out by Lord Campbell, the Law was changed, and a Deacon in Holy Orders was substituted for a Mass-priest, the Law was completely suitable to every portion of the realm where the Church of England was established. But to countries where the Common Law extended, yet in which there was no Church establishment, or parochial divisions, the Law in its terms was never capable of being applied ; and therefore it results clearly, that that portion of the Law requiring the presence of a Minister was wholly local in its character, and a mere municipal regulation. This argument is completely confirmed by a consideration of the Council of Trent. That Council, for the same reason no doubt as actuated the Anglo-Saxon monarch, viz., for the purpose of preventing clandestine marriages, and for securing the testimony of the most revered functionaries in society, required the presence of the Parish Priest (*parochus*) at the celebration of a marriage. But the Council has always been held to be of local application only, exactly like the English Marriage Act of 1754.

It may be said, however, that at the first establishment of English Law in India the rule imposed by King Edmund; as modified at the Reformation, was capable of being complied with in terms. This, however, is completely contradicted by history. The first establishment of the English in India was at this very place, Surat, and dates from the year 1611, and previous to that time we had establishments in Sumatra, and in Java, as well as in other of the southern islands. In a very few years our settlements extended themselves to Ahmedabad, Gogo, Cambay, and Broach. Factories were stationed on different parts of the Coromandel Coast, and presidencies created at several different parts of the East, which were all made subordinate to the chief settlement at Surat.* But it was not till near a century later that any provision was made for Chaplains, and even then in the most modest proportion ; and up to living memory,

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* 1 Mill's Hist. Brit. India, b. i., c. 4.

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I believe, the number of chaplains assigned to this presidency, which contains many millions of inhabitants, was only three. The state of the inhabitants, therefore, on Pitcairn's Island, who were desirous of entering into holy wedlock, was not more forlorn or more a case of necessity than that of the English in India during the first century of their settlement.

Neither can it be alleged that in those times it was the policy or practice to encourage celibacy. On the contrary, Mr. Ovington, the chaplain to the ship-of-war which conveyed to India the intelligence of the accession of William of Orange, informs us that it was the policy of the East-India Company to encourage marriages at their different factories; and he gives rather a piquant account of the ship-loads of young ladies who came out to India accordingly, and of the various hazards which beset them during the voyage.

This being the state of facts as to our early settlements in India, the practice which has existed so far back as any trace can be discovered has been to celebrate marriages, in the absence of a clergyman, in as solemn a manner as the nature of the case permitted. Every European in India, who has been any time in the country, is able to enumerate many of his friends, amongst whom, or amongst whose connections, such marriages have taken place; and if, for the reasoning suggested, the presence of a Minister in Deacon's Orders is an institution local in its nature, and having reference only to countries such as England and Ireland, where the Church of England is established by Law, it follows that the Common Law of England introduced into India accords with the rule which both the Civil and Common Law would pronounce, as well as with the dictates of reason which a dispassionate view of the subject seems to suggest. It need only be added, that if the Common Law was thus introduced with the qualification here mentioned, then, as there has been no alteration of the Law by statutory provision since, the Common Law remains entire as it was first established in the country.

And to prevent any misconception which might arise as to the period when English law was introduced on this side

of India, I will point out that, as to Europeans, the period in question cannot be placed at a later period than the year 1661, when Charles 2 granted the island of Bombay to the Company, and empowered them to make acquisitions of other territories, and govern them all by laws "consonant to reason, and not repugnant or contrary, but as near as may be agreeable, to the laws of this our realm of England."

The question has been hitherto viewed, however, in a much more limited sense than belongs to it; and solely with reference to British subjects, who may be sojourners for a brief period within the Company's dominions in India. But the Common Law of England applicable in India is called upon for a rule of much wider scope. The general Marriage Law is not a *personal* law, in the sense in which the later civilians use the term, and in the sense in which the Marriage Law relating to members of the Royal Family has lately been construed. The provisions, therefore, which the English law prescribes for the celebration of a marriage, do not follow the person into whatever country he may go, but he is at liberty to enter into the contract according to the law of the country where he may happen to be. On this principle, which belongs to universal jurisprudence, European Protestants, to whatever country they may belong, who find themselves in British India, are entitled, in respect of the comity between nations, to ask for the legal sanction of the country to the matrimonial engagements which they may wish to form. But it is not only in respect of European or American foreigners that this claim arises. There are, perhaps, hundreds of thousands of Protestant Christians in different parts of India who are subject to our law. By acquisitions of various kinds, the settlements of the Protestant Dutch and Danes have come into our hands. The Missionary Schwartz made converts to the Confession of Augsburg by thousands in the south of India, and our missionaries in other parts of the empire, though not, perhaps, equally successful, have nevertheless congregated large circles of native converts around them. With respect to all these widely-extended classes, neither religious belief, nor their national jurisprudence, nor the regulations of the Eng-

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lish Government, have ever suggested the idea that the presence of an ordained Priest was required at their nuptials. But if, in the train of British conquest, and of the praiseworthy efforts of our zealous missionaries, one of the consequences has been to spread concubinage and bastardy throughout the land, it must cause every lawyer, I think, to blush that the system which he professes should contain a rule pregnant with such consequences, and so unsuitable to the dearest interests of mankind.

The portion of the Common Law, requiring the presence of an ordained Minister at a marriage, never introduced into India.

For the reasons which I have given, I am thoroughly satisfied that the second premiss, on which the invalidity of this marriage is based, completely fails, and that that portion of the Common Law, requiring the presence of an ordained Minister at a marriage, was never introduced, and does not now exist, in India.

I ought in candour to mention, in conclusion, the only argument which appears to me to militate against the above reasoning. It is founded on the proviso in the 58 Geo. 3, c. 84, which was a declaratory Act relating to marriages by Presbyterian Ministers. For it may be contended that the effect of that proviso is to render all such marriages, except when performed in the way pointed out by the Statute, illegal in future. But on looking at the studious way in which the Legislature, both in this Statute and in all other Statutes relating to marriages beyond the seas, has abstained from passing more than a declaratory Statute;—on attending to the accurate definition by Lord Campbell, in the House of Lords, as to the purport of a declaratory Statute, that it is a positive announcement by the Legislature that the law (so) declared existed before the passing of the Statute;—and on advertng to the occasion which produced this special legislation; I am convinced that the sound construction to be given to this proviso is, that it contains no new enactment as to the general law, but special directions only as to Presbyterian Ministers, the breach of which would be no doubt penal, but which, as in the case of other directory provisions in the Marriage Act, might not make the marriage so performed wholly invalid.

Prerogative Court of Canterbury.

JULY 18, 1837.

LOPES v. HARTLEY. — The deceased, Dionysio Pedro Lopes, died in 1827, intestate, leaving a widow and children domiciled and resident in Portugal. In 1818, a suit had commenced between Mr. De Tastet and the deceased (resident at Lisbon), in the Court of Chancery, which continued at his death. In 1828, administration of the deceased's effects in England was granted to Mr. Jas. Hartley (who had carried on the suit as his solicitor), limited to substantiating the proceedings in Chancery. In the first instance, Mr. Hartley had obtained a general grant, as a creditor, against which a *caveat* was entered by another creditor, and the grant was called in and rescinded, and a limited grant substituted, the widow and children (in whom the whole interest in the property vested) being cited (not personally, but by notice on the Royal Exchange), and not appearing. In November, 1836, the widow, having accidentally put into an English port, applied to this Court to call in the administration granted to Mr. Hartley, and to decree a general administration to her attorney.

Dr. Phillimore, for the Administrator.—The Court cannot, after a lapse of eight years, allow a party to call in the limited administration granted for the purposes of the suit, and claim a general grant, which would nullify past acts.

Dr. Lushington, contra.—This administration was granted without any actual notice to the parties ultimately interested in the property, the widow and children, who were resident and domiciled abroad, out of the jurisdiction of the Court, *inopes consilii*, and not aware of their interest in the matter. There was ample time for notice to Mrs. Lopes, but nothing appears to have been done. It is competent to the Court, upon adequate cause shown, to revoke a general grant of administration, and *a fortiori* a limited grant. We are dealing with foreigners, and with the property of foreigners. See the consequences if the Court refused to

Where administration of the effects of an intestate had been granted to his solicitor, limited to proceedings in Chancery, the widow and children (in whom the property vested, and who were domiciled and resident abroad) being cited by notice on the Royal Exchange and not appearing; the Court, on application of the widow, eight years after, representing that she had been ignorant of her rights, refused to revoke the grant.

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revoke a grant of this kind. Suppose there had been a general grant to a creditor for a debt of £50, and under that grant, by a proceeding in Chancery, he gets the control and management of the whole property. In such a case is the grant irrevocable? The Court has the power to revoke an administration of this kind. *Re Jenkins*.* The only question is whether, under the circumstances of this case, the Court will exercise its discretion, and, revoking the limited administration, make a general grant to the party entitled to the property. No injury to Mr. Hartley is suggested, and none can arise, from granting the application, which can prejudice no just right or claim; whereas, with respect to Mrs. Lopes, her whole property in this country is now under the control of a person who, being both administrator and solicitor, has an interest adverse to hers, it being his interest to increase litigation and to protract the suit.

JUDGMENT.

SIR H. JENNER.

Although the Court has power to revoke an administration, I do not consider that it should do so where there was no misrepresentation in the first instance in obtaining a limited grant. If parties are to run the risk of such administration being revoked, great mischief and danger would ensue. In the case cited, the administration was revoked on the ground that all parties entitled had not been cited. I am unwilling to revoke an administration which has been so long out. I do not see why the widow and children could not have come in and sought a revocation of the grant between 1828 and 1836. If I am called upon to determine the point, I should feel some difficulty in revoking this administration, though I may see reasons in this particular case why it should be revoked. It had better stand over.

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THE COURT ultimately rejected the petition of the widow, and confirmed the limited administration, making no order as to costs

* 3 Phill. 33.

Supreme Court of Judicature, Bombay.

AUGUST 14, 1849.

THE "LORD DUFFERIN" (CLARK).—Cause, by Act on Salvage. —
Petition.—This was an action to recover a salvage remunera- Tender pronounced for.—
tion, by Lieutenant Rennie, the Commander, the owners Services rendered to a private merchant-vessel by officers belonging to the maritime service of the East-India Company, in a vessel the property of the Indian Government. — The considerations which apply to claims on the part of the Government for assisting British commerce in distress, and to the scale of remuneration due to its officers in rendering such assistance.
(the East-India Company), the officers and crew, of the
steam-ship *Feroze*, for services rendered to the ship *Lord*
Dufferin and her cargo, value together about £25,000. This
vessel sailed from the port of Bombay on the 20th June, 1849,
bound for Liverpool. Early on the following morning, the
weather being boisterous, she bore up for the harbour, and
came to anchor on the Middle Ground. On the 23rd, she
again weighed and put to sea, the weather very threatening,
the wind squally from the S.W., when a heavy sea struck the
ship violently, carrying away the rudder. Those on board
let go their best bower anchor in seven fathoms water, where
they remained during the night, the sea making a constant
breach through the stern, there being four feet water in the
hold. The vessel drifted so much during the night, that, at
daybreak of the 24th, she was within three-quarters of a mile
of the Island of Kenery, and for safety, they slipped and made
sail. Finding they were drifting on the Tull Reef, they let
go the starboard anchor in 5½ fathoms water. In the after-
noon, a heavy sea struck the ship, and filled the cabin with
water. During the night, the weather moderated, and in the
morning of the 25th, the East-India Company's steam-frigate
Feroze came up, and towed the *Lord Dufferin* as far as the
outer Light-ship, where she anchored.

A tender of Rs. 5,000 was made and refused.

SIR T. ERSKINE PERRY, C. J.

JUDGMENT.

This is a case of salvage claimed against the ship
Lord Dufferin on the part of several of the officers of the
East-India Company, and we intimated that it appeared to
us, on facts which seemed to be undisputed, that the service
performed in this case was a salvage service. Without

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attempting to lay down a complete definition of what salvage is,—for all definitions in law are said to be dangerous,—it does not seem open to objection to hold that salvage occurs whenever assistance is rendered to a ship at sea which is in such a dangerous position that in all human probability she will not be able to extricate herself by her unassisted efforts.

We are clearly of opinion that the *Lord Dufferin* was in this condition. The loss of her rudder, her exhausted crew, her position in foul ground, the strong wind of the monsoon, and a large shoal under her lee, all rendered it highly improbable that at the time when the *Feroze* made its appearance, she could have got out of her position without the assistance of steam, and it is not at all unlikely that if the strong gusty weather, which often occurs at that season of the year, had come on, she would not have been able to ride out another flood-tide. All these circumstances constitute the service which was rendered a salvage service; nor does it, I think, detract from the character of the service, that, in the weather which did actually occur, and by the means which the captain was in the act of taking for procuring assistance from the shore, he in all probability would have been able to get his vessel off at a comparatively small expense. Such considerations may affect the quantum of the amount to be paid as salvage, but they do not alter the nature of the service rendered, which is to be determined, I conceive, by the actual danger at the moment of rendering it, and not by subsequent events, which no one was capable of foreseeing. This being so, the main question is, whether the sum of Rs. 5,000, which has been tendered, is a sufficient remuneration for the salvors.

Considerations
applicable to
claims by Go-
vernment.

To determine this question, it is important to ascertain who the salvors are who are claiming, for this fact does not appear very clear in the meagre pleadings of this case; although, owing to inquiries put by the Counsel for the ship and by certain minute facts in the case, I think a very satisfactory conclusion upon it may be arrived at. At the first view of this case it certainly would appear that the present claim was preferred by the Government of the country; and if this were the case, a number of considerations would have

to be carefully weighed, which have never, to my knowledge, been discussed in a Court of Justice. For, although we see cases in the Books where the Lords Commissioners of the Admiralty have preferred claims incidentally for reimbursements to Government ships whose crews had earned salvage, there is no case, that I am aware of, in which the Queen's Government, having determined to assist a merchantman in distress, have subsequently brought their demands into a Court of Justice for salvage reward. Whenever such a case does occur, it will probably be held, that the Government are entitled to claim salvage, though if an act of salvage be an act of Government, there is some difficulty in understanding how it would form the basis of a civil contract,—which seems to be the true foundation of a salvage claim,—or what reciprocity there would be, so as to give the merchant a cross action against the Government if the salvage was negligently performed. But however this be, if the legal right were held to exist, undoubtedly a variety of topics would occur, which, although more fitting for discussion in the Cabinet or the Legislature, would also be perfectly legitimate in a Court of Justice, in order to determine the *amount* of damages which a Jury or other competent tribunal ought to give. For it is impossible to avoid observing, that there are various marked distinctions between a Government and a private salvor. The latter builds and maintains his ship and crew solely for purposes of profit; he is seeking it eagerly in every part of the world; time to him is money, and he has no interest or concern in the successful ventures of his neighbour. But the public ships of a Government are not kept for profit at all, but entirely for the public service. In peace they have scarcely any duties to perform but the protection of commerce, and when they are not performing these duties, they are often lying idle in harbour, with powerful crews, ample equipments, and actually doing nothing. Moreover, the private salvor has no large and abiding interest to protect the commerce of a particular port; he happens to be there for the nonce, and it is wholly indifferent to him, except so far as his individual interests are concerned, that large, generous

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principles of protection to commerce should be extended to the mercantile world generally. But an enlightened Government, especially a British Government, has such motives acting upon it most forcibly ; and in every British dominion in the world, I will not scruple to say, that the largest protection and assistance to British commerce which can be afforded by the Government, without disparagement to other public duties, is regarded as among its paramount obligations. And I was rather surprised, I confess, to hear in this Court the light, not to say contemptuous, tone, with which "cotton bales" were spoken of. It appears to me that the interests of commerce, such as I have been referring to, should always be kept broadly in view by Civil Courts of Justice ; and if on the highest tribunal of the kingdom a woolpack was placed to remind the authorities of the great staple of the country, so a Maritime Court, sitting in dominions won by the energy and enterprize of a Company of Merchants trading to the East Indies, should not be slow to recognize, that one of its most important offices is the protection of British trade.

But it does not appear to me, that in fact the Government have preferred a distinct claim for salvage remuneration ; and although the Act on Petition professes to be made "for Lieut. Rennie, the officer commanding, for the East-India Company, the owners, and for the officers and crew, of the steam-ship *Feroze*," still I think that the true conclusion which is to be drawn from all the facts of the case is, that the Government have no further interposed than to allow Lieut. Rennie to use their name, in order to enable him to make the best of it he can for his own purposes. And I found this opinion on the three following considerations, which are corroborative of the conclusions I draw in my own mind, as to the enlarged view of policy entertained by the Bombay Government. 1st. The Government, acting through its Military Department, sent in its charge for the expenditure of coals, &c., in the two steamers employed, and made no mention of any other demand. 2nd. The Government have not preferred any distinct claim as to the amount to which they may be entitled in respect of a per-

centage as interest on the valuable Government property employed in the salvage, which is a very different matter from the claim made by Lieut. Rennie for his *personal* services. 3rd. In the nominal Rule which the claimants were called upon to make, only the names of Lieut. Rennie and the officers of the *Feroze* and of the pilots appear. The only visible intervention of the Government, therefore, in this case, is traceable in the allegation (not on oath) of the Act on Petition, that the claim is made on behalf of Government, as well as on behalf of Lieut. Rennie : which allegation is explicable on the suggestions before made.

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But supposing that I am altogether wrong in the conclusion of fact which I have drawn, and that the Government of Bombay do not take those views of policy which I suppose to actuate them, as to the duties of protecting British commerce when in distress, and within reach of Government assistance, and that they are preferring this claim in order to get as much remuneration for their services as the law awards ; and supposing also that I am wrong in my legal doubts, whether a Government ship, lying idle in harbour, is entitled to remuneration for salvage on the same scale as the ship of a merchant, who is seeking only his own private emolument (on which point Sir John Nicholl's observations, in the "*Clifton*,"* support my views) ; still both these errors, if they be such, are innocuous on this inquiry ; for I cannot possibly see how, in any view of the case, the claim of the Government, as salvors, can be placed higher than that of private salvors.

The harbour of Bombay is beset with many dangers in the south-west monsoon ; if a ship once gets to the northward of the harbour, the road back is difficult ; to the southward there is a lee shore, and at the entrance of the harbour much foul ground. Occasions will, therefore, frequently arise for assistance to merchant-vessels making for the port at this period of the year. But if Government enter the field as a salvage company, it must be admitted, they will have great advantage over private salvors. Several Government establishments,—such as the Light-house, the

* 3 Hagg. A. R. 121.

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Pilot Service, &c.,—are kept up for other public purposes, through which establishments information of what is occurring in the offing will reach the Government more speedily than the ears of private shipowners; and in time of peace, large steamers, ready for sea at a few hours' notice, will usually be available for any salvage purpose, without detriment to the public interest.

When a salvage claim is made by Government under such circumstances, the inquiry naturally will arise as to what a private salvor would have done the work for, if he had been enabled to make a fair start in the race; and as it is proved to me satisfactorily that a private steam company would have been glad to undertake, and well able to perform, the service in question for Rs. 4,000 or Rs. 5,000, it appears to me to be impossible to award a larger sum to the present claimants, whoever they may be.

The claim for salvage in this case is referrible entirely to the state of danger from which the *Lord Dufferin* was rescued, and the steam-engine and the coals were in fact the true salvors; of personal risk, or any extraordinary labour and naval skill, on the part of Lieut. Rennie and his officers, I see no indication; and the few hours employed in the trip to the *Lord Dufferin* do not appear to me to differ, so far as the equipage of the *Feroze* is concerned, from any similar amount of steaming about the harbour at that period of the year. But Lieut. Rennie's claim is based by his Counsel on the responsibility which he encountered in employing a Government vessel in the service of private shipowners, and the case of the "*Lustre*"* is relied on; but there is a fallacy in arguing that responsibility on this score can exist, as the service was performed under the direct orders of Government. It is true that, in the examination of Lieut. Rennie, he brought forward a responsibility of another kind, which he confronted on deciding to take the steamer out of the pilot's hands. But this also, on examination, appears to have been so slight a responsibility, that it is not mensurable in money; for Lieut. Rennie states, and I have no doubt quite correctly, that he knew the harbour quite as

* 3 Hagg. A. R. 154.

well as any pilot,—the part of the harbour to which he was steaming was not pilot's ground, and therefore was not better known to the pilot than to himself, who has been acquainted with the harbour for twenty years; and it appears by the evidence that, under the experienced treatment of Lieut. Rennie, long conversant with steamers, and with the then state of the tide, the *Feroze* encountered no danger whatever. The salvage claim is, therefore, limited to the due remuneration for a steamer powerful enough to perform the requisite service; and I am satisfied, from the evidence at the Bar, that Rs.5,000 is quite enough, and that, looking at the interests of commerce on the one side, and the personal services rendered by Lieut. Rennie and the crew on the other, it would be unjust and impolitic to give a larger sum.

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I have gone at greater length than I could have wished into a discussion of the principles which I have applied to the decision of this case, but I have been desirous fully to explain them, because, in my opinion, unsound doctrines have been broached in this Court with respect to them. To all who are conversant with jury trials in England, it is well known that, in cases of assessment of damages, the moral feeling which is prevailing amongst the jury on the subject under discussion operates largely, and in most cases beneficially, on the amount awarded. The jury not being called on to give reasons for their decision, the exact opinion, and the grounds of it, entertained by them, cannot be made patent in black and white. But when the decision is vested in judges, who have to give their reasons, they are usually able to explain the motives operating upon their judgment; and I have no reluctance whatever to explain the temper of mind with which I regard these claims brought forward by Government officers for salvage, and which have made their appearance on three several occasions during the current year. I view them with regret. I do not like to hear it suggested that three-and-sixpenny motives are necessary to be put in action to call the distinguished services of India into performance of public duties. I recollect reading, before I arrived in India, a glowing eulogy on the different services, made by Sir John Malcolm at the bar of the House of Commons, describing their zeal, their public spirit, their

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Lord Dufferin. freedom from all petty, sordid motives,—*avidī laudis, pecunie liberales, erant*, as was said of another distinguished race of administrators during their best period. My own experience of India confirms the truth of the above description, and the spirit it denotes is, in my opinion, so desirable to be encouraged, both for the renown of England and the welfare of India, that I have no doubt this impression has operated largely on my mind whilst engaged in estimating the pecuniary claims of members of the service on British merchants in distress.

SIR W. YARDLEY, J.

I concur in the judgment of the Chief Justice, that the sum of Rs. 5,000, tendered to the salvors, was an adequate remuneration for the services performed.

1st. Because I am of opinion that the *Lord Dufferin* was not in imminent danger. Indeed, if it had not been for the loss of her rudder, I should have had some difficulty in holding that the service was a salvage service at all, the case bearing a strong resemblance to many recently decided in the English Admiralty Court, in which the services were pronounced to be "towage," and not "salvage." 2ndly. On the whole evidence, I am of opinion that the salvors did not run any great personal risk, and that the steam-ship *Feroze*, having had seven fathoms of water alongside of the *Lord Dufferin*, was not placed in a situation of danger by rendering the assistance required. 3rdly. The service was somewhat imperfectly performed; for although the *Lord Dufferin* was towed to a situation of less danger than that from which she was removed, the position in which she was left, half-way between the Tull Shoal and the outer Light-ship, could not be considered eligible at that season of the year.

For these reasons, although I am quite ready to recognize the right of the officers and crew of a man-of-war to a remuneration for salvage services, on the same scale as it would be awarded to a private salvor, I do not think the claimants entitled to a larger sum than has been tendered, which, if it had been accepted without resorting to litigation, would have given all the parties engaged not far short of a month's pay for the exertions of a few hours.

Judicial Committee of the Privy Council.

JULY 4, 1850.

HAMMOND AND GRISWOLD v. ROGERS AND RODD.—Collision.—*Appeal.*—*Cause.*—This was an appeal from a sentence of the High Court of Admiralty in a cause of damage, wherein the owners of the barque *Marshal Bennett* sued the American ship *Christiana*, to recover the loss sustained in a collision between the two vessels in the Downs, in December, 1848; the Judge of the Court below, assisted by Trinity Masters, having pronounced for the damage against the *Christiana*, first, because that vessel,—which, with a pilot on board, having been brought to anchor, had been run into by another vessel, and made to start from her anchorage,—had neglected to send down her top-gallant and main-royal yards, also her short fore and mizen top-gallant masts; secondly, because she did not set her stay-sail and jib, and so dragging her anchor off shore; that, though the latter was the fault of the pilot alone, the first was a neglect not only of the pilot but of the master, and consequently the owners were not exonerated under the Statute.*

Sir J. Jervis, A. G., for the Appellants.—The *Christiana* having been at anchor until she was started from her anchorage, by being run into by a strange vessel, the fact of her top-gallant and main-royal yards, and her short fore and mizen-top-gallant masts not being sent down, has nothing to do with the question, since it did not occasion the collision; and the pilot has deposed that there was no occasion to send them down. The cause of the collision was her being driven from her moorings; and assuming, what is not alleged, that, when so driven, she was rendered less capable of control from their not having been sent down, was she, therefore, to be responsible for the damage? There might be gross negligence in not sending down the

A ship, with a licensed pilot on board, having, whilst at anchor in the Downs, in a December night, the weather bad, been run into by another vessel, and made to start from her anchorage, and she drove into a vessel at anchor:—Held, affirming the judgment in the Court below, that she was to blame, first, because, notwithstanding the bad weather and a large number of vessels lying wind-bound in the Downs, she neglected to send down her top-gallant and main-royal yards, also her short fore and mizen top-gallant masts; and secondly, because she did not set her stay-sail and jib, and so dragging her anchor off shore:—Held, further, that,

* *Antea*, p. 2, where the facts are stated.

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though the latter was the fault of the pilot alone, the first was a neglect not only of the pilot but of the master; and consequently the owners were not exonerated under the Statute.

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yards and masts, yet if the injury did not arise directly therefrom, but from something else, the cause was too remote. Assuming, however, that it was otherwise, the bringing up of the vessel, the manner in which she should be anchored, and the keeping up or sending down the yards and masts, were duties appertaining to the pilot, whose functions, when the vessel drifted, re-devolved upon him, and if the fault was his, the owners are exonerated. There could not be joint neglect where there was not co-equal authority, unless where, as in *the "Diana,"** pilot, master, and crew left their duty; there being a distinction between acts of omission and of commission. A pilot is *pro hac vice* the commander of the vessel, and should have absolute control, unless incompetent or disabled. *The "Duke of Manchester."*† Moreover, the anchor of the *Marshal Bennett* was not in proper condition, so that she was herself in *delicto*.

Dr. Addams, on the same side, cited *the "Itinerant,"*‡ *the "Atlas,"*§ and *the "Gipsy King."*||

Sir F. Thesiger, Q.C., for the Respondents.—The not sending down the yards and masts of the *Christiana* was the real cause of the collision. Her dragging her anchor was not owing to her being run into; she had dragged her anchor before then; but it was caused by her not adopting the precaution taken by other vessels, of sending down her yards and masts. This was not the duty of the pilot, whose charge was in fact at an end the moment the vessel was brought to her anchorage in the Downs.

Dr. Bayford, on the same side.

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JUDGMENT.

MR. BARON PARKE.

This case, which came before their Lordships on an appeal from the Admiralty Court, is of importance, inasmuch as it involves the consideration of the respective duties and liabilities of the pilot, and master and crew, when the vessel is under the care of a pilot. It is a cause

* 1 Rob. jun. 131. 4 Moo. P.C.C. 11.

† 4 Notes of Ca. 575. 5 Notes of Ca. 470.

‡ 3 Notes of Ca. 5.

§ 5 Notes of Ca. 80.

|| 5 Notes of Ca. 282.

of damage, civil and maritime, prosecuted by the owners of the *Marshal Bennett* against the American ship *Christiana*.

The charges of negligence against those on board the *Christiana* appear, from the Act on Petition, to have been four. First, that, notwithstanding the bad state of the weather, the large number of vessels (about 100) lying wind-bound in the Downs, and also notwithstanding the *Christiana* had been driving about the greater part of the night, those on board her neglected to send down the topgallant and main-royal yards, and also her short fore and mizentopgallant masts, though the same or similar precautions were adopted by the *Marshal Bennett* and other vessels in the Downs, whereby they were enabled to ride out the bad weather in safety, some of them with only one anchor down; and that, had the *Christiana* adopted the same precautions, she would in all probability have ridden out the weather, and the collision would not have taken place. Secondly, that, after the *Christiana* was driving, those on board did not take proper precautions, by exhibiting a light, or otherwise, to give timely warning to other vessels. It was also stated that, besides the collision complained of, she fell foul of the French ship *Rouennais* before the *Marshal Bennett*. Thirdly, that, after leaving the *Rouennais*, those on board the *Christiana* might have cleared the *Marshal Bennett* if they had set their staysail and jib, and so might have dragged their anchor off shore. Fourthly, that they might also have slipped their anchors, and gone out to sea, and so have avoided the collision.

The Answer, on behalf of the *Christiana*, was, first, that she was under the care and management, at the time of the collision, and before, of a duly licensed Trinity pilot, whose orders were implicitly obeyed. Secondly, that the collision was caused, not by the ship driving by the mere force of the wind, but in consequence of a strange barque driving her from her moorings about half-past two A.M., during a heavy squall, and that every proper precaution was afterwards taken to prevent her coming in contact with other vessels. Thirdly, that a light was duly exhibited on board the *Christiana*. Fourthly, that they did set their staysail and jib at the proper time to avoid the collision, and that

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there was no occasion to send down her top-gallant mast and main-royal yards, and her short fore and mizentop-gallant masts. And, lastly, that the damage might have been prevented if the crew of the *Marshal Bennett* had kept a good look-out, and had slipped their cable ; but that it was foul, and consequently that step was not taken ; and, therefore, though the crew of the *Christiana* might be in fault, the owners were not responsible.

The disputed questions of fact were disposed of, and we think satisfactorily, by the learned Judge below, with the assistance of the Trinity Masters. The neglect to exhibit a light, or give timely warning, by the *Christiana*, after she broke from her mooring, was disproved. We think also, that the fact was that the *Christiana* was driven from her anchorage, not by the force of the wind, but by collision with another vessel : whether she afterwards ran into a French vessel (the *Rouennais*), or not, does not appear to us to be material. Nor do we see any reason to disagree with the conclusion of the Trinity Masters, that the *Christiana* was in fault in not setting the staysail and jib, and so dragging the anchor from the shore, after she was driven from her anchorage, and that she was justified in not slipping from her anchor and going to sea. We are satisfied with their opinion, that the *Marshal Bennett* was not guilty of any neglect whereby the collision could have been avoided. We also think it clear that, though the *Christiana* came to anchor the night before, and the pilot might have left her, yet that, as he did not, she continued under the charge of the pilot. And we think, also, that they came to a right conclusion, that, considering the state of the weather, and the position the vessel was in,—with a large number of vessels lying windbound in the immediate neighbourhood,—it was a neglect not to send down the topgallant and main-royal yards, not even after she began to drift,—a fact admitted on both sides,—and that, if this had been done, either when the vessel anchored or after she drove, the collision might have been avoided ; and that this neglect was the cause of it.

The question
at issue.

The disputed facts being thus disposed of, the question is,

whether, upon these facts, the owners of the *Christiana* are responsible, or not.

This is a very important question, and it depends upon the extent of exemption which the shipowner is entitled to when his vessel is in charge of a pilot.

The exemption depends upon the 6 Geo. 4, c. 125, sec. 56, which enacts that no owner or master shall be answerable for the damage which shall happen from or by reason or means of the neglect, default, incompetence, or incapacity of any licensed pilot duly acting in charge of the vessel under the provisions of this Act.

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Extent of
the statutory
exemption of
owners.

It was held at first, in putting a construction upon this Act, that if a pilot was on board, and there was a neglect in the navigation of the vessel, it was *primâ facie* attributable to him, and that he, and not the owner, was responsible, unless it was shown that his orders were disobeyed. This is laid down in *Bennet v. Moita*.^{*} Subsequently, a different, and we think a more correct, view of this subject was taken by Dr. Lushington, the Judge of the Admiralty Court, in the case of *the "Protector,"*[†] when, on a full consideration of the question, it was held that the master and owners were *primâ facie* liable, and the *onus probandi* was thrown on them to show that the neglect was that of the pilot. In order, then, to free the owners in this case from responsibility, it was their duty to show that the neglect to send down the top-gallant yards, masts, &c., was the neglect of the pilot. Further, it was held in the case of "*the Diana*,"[‡] affirmed on appeal by this Court,[§] that the owners were responsible, unless the neglect which caused the damage was solely that of the pilot. If it was the fault of both the pilot and the master or crew, the owners are still responsible. The question then is, whether the omission which is decided to have been the cause of the collision in this case has been shown by the Appellants to be that of the pilot only.

The duties of the master and the pilot are in many re-

^{*} 7 Taunt. 258.

[†] 1 Rob. jun. 131.

[‡] 1 Rob. jun. 43.

[§] 4 Moo. P. C. C. 11.

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—
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Rogers.

spects clearly defined. Although the pilot has charge of the ship, the owners are most clearly responsible to third persons for the sufficiencies of the ship and her equipments, the competency of the master and crew, and their obedience to the orders of the pilot in everything that concerns his duty; and, under ordinary circumstances, we think that his commands are to be implicitly obeyed. To him belongs the whole conduct of the navigation of the ship, to the safety of which it is important that the chief direction should be vested in one only.

The expression attributed to the learned Judge, in the Report of his Judgment in this case,* we are perfectly satisfied, was never intended to suggest that, under ordinary circumstances, the master was to exercise any discretion whether he would obey the pilot or not. There may be extraordinary occasions when the master would be justified in disobeying the commands of the pilot. If from sudden illness or intoxication he becomes incompetent to command, the supreme authority would revert to the master during the period of his temporary incapacity. It may be the same in the case of manifest incapacity of a permanent character; but any opinion upon these questions is unnecessary for the decision of the present case, as none of these circumstances occurred. The pilot has, unquestionably, the sole direction of the vessel in those respects where his local knowledge is presumably required; the direction, the course, and the manœuvres of the vessel, when sailing, belong to him; and the Trinity Masters, therefore, rightly decided that the neglect to set the staysail and jib, after the *Christiana* was driven from her anchorage, was the fault of the pilot alone. It was also his sole duty to select the proper anchorage-place and mode of anchoring, and preparing for anchoring, as was held to be clear in the case of the "*Gipsy King*."†

Whose neglect, then, was it that the topgallant-yards, masts, &c., the cause of the damage, were not sent down? The Trinity Masters considered that it was the fault, not of

* *Antea*, p. 7.

† 11 Jur. 357. 5 Notes of Ca. 282.

the pilot exclusively, but of both the pilot and the master; that the former, when he brought the vessel to anchor, ought to have seen that the topgallant yards, &c., were sent down, as a part of the proceeding of anchoring, and after the vessel drifted, he ought to have done so, as a part of his duty in navigating the ship; but that the master was bound, in the ordinary course of navigation, and independently of local knowledge, to do the same thing, in the first instance, in such an anchoring-ground, and under such circumstances as the *Christiana* was placed in. This, we have good reason to believe, was the ground on which their opinion was founded. Had this been a local usage, depending on local circumstances, we should have thought that it was the exclusive duty of the pilot to have taken care that that usage was complied with; but the step being one which every master, according to the ordinary course of navigation, ought to have taken in every open roadstead, where many vessels were lying, and in blowing weather, that duty was not exclusively the pilot's, but that of the master also; and if the pilot had given express orders to the master not to send down the topmasts, &c., we do not say that the owners might not have been excused from responsibility for the consequences of that omission.

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Rogers.

The neglect
that of pilot and
master jointly.

We certainly are not bound, any more than the learned Judge of the Admiralty Court was, by the opinion of the Trinity Masters, but we, of course, give great weight to their nautical experience, and we do not see any ground for being dissatisfied with the opinion that they formed. We think that the fault, in this case, was one for which the pilot was not exclusively responsible, and, therefore, that we ought to advise her Majesty to affirm the judgment of the Admiralty Court.*

Judgment be-
low affirmed.

Proctors: *F. Clarkson*, for the Appellants; *Rothery*, for the Respondents.

* The Committee consisted (at the Argument) of Lord Brougham, Lord Campbell, Lord Langdale (M.R.), Mr. Baron Parke, and Mr. T. Pemberton Leigh. Before the judgment was delivered, Lord Campbell had become Chief Justice of England.

Prerogative Court of Canterbury.

JANUARY 17, 1890.

Practice. — Probate of the will of a subject of Portugal, dying possessed of property in this country, having passed to his executor, who died intestate, leaving money in the English funds still standing in the name of his deceased; probate of the said will was granted to the party upon whom, by the law of Portugal, the executorship devolved, and who had been clothed there with the legal authority.

In the Goods of JOAQUIM JOSE ESTANISLAU VIEIRA, and Motion, to prove. — The deceased, formerly of Mexico, in China, but late of Lisbon, died 27th June, 1846, having made his will, and therein named executors, in the words following: — "I appoint for my executor in the city of Lisbon, whither I am about to proceed, my cousin, Joaquim José da Veiga Castro Ferreira, and I also appoint him guardian of all my sons and daughters both by my first and my second marriage: in default of my aforesaid cousin, I appoint as executors Messrs. Bento José Cardoso, and Domingos Manoel Ettiaco Coutinho, jointly in default of these, I appoint as executors Messrs. Custodio José Ferreira Braga and Joaquim Antonio de Moraes Covares, jointly."

The deceased was possessed, at the time of his death, of £160,000 in the Three per Cent Consols, and a sum of £19,538 cash in the hands of Messrs. Baring, Brothers, and Co., besides property in Calcutta, Rio de Janeiro, Macao, and Lisbon.

On the Caveat-Day after Trinity Term, 1846, this Court, on motion,* decreed probate of the will to the said Joaquim José da Veiga Castro Ferreira, as the sole executor, the Court being of opinion that any intention implied by the words, "I appoint for my executor in the city of Lisbon," to limit the executorship to the property of the deceased in that city, was rebutted by the general tenour of the will, which afforded the strongest presumption of the testator's intention to constitute the persons named in the appointment executors of the whole of his estate, and in February, 1847, probate was accordingly granted to the said J. J. da Veiga Castro Ferreira, as the sole executor. He died 6th August, 1849, intestate, and the money in the Funds was still standing in the name of the deceased. By the laws of Portugal, the executorship devolved upon Messrs. Bento José

* 4 Notes of Ca. 698.

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JAN. 17.*Ferreira Veiga,*
dec.

Cardozo and Domingos Manoel Ettneo Coutinho. By an extract from the Court of the Administration of the Upper District of Lisbon, it appeared that, on the 27th August, 1849, Senhor Domingos Manoel Ettneo Coutinho appeared at the Administration of the Upper District of Lisbon, and declared that he came to sign an Act of "Desistance from the Executorship" of the testament of the deceased, which executorship pertained to the Desistant by reason of the demise of Joaquim José da Veiga Castro Ferreira, as being the second-named executor, and which being brought under the cognizance of the Administrator, he ordered an Act to be drawn up, which he signed, together with the Desistant and witnesses present. It further appeared from the said extract, that the said Bento José Cardozo constituted as his competent attorney M. José Maria de Salles Ribeiro, for him and in his name, as though he were present, to sign at the Administration of the Upper District the Act of Acceptance of the Executorship of the late J. J. Ferreira da Veiga, which executorship pertained to him by reason of the death of the first-named executor, J. J. da Veiga Castro Ferreira; and it further appeared that, on the said 27th August, 1849, the said José Maria de Salles Ribeiro, solicitor in the law, in the name and as the attorney of Bento José Cardozo, which he proved himself to be, appeared at the Administration of the Upper District of Lisbon, and declared that J. J. Ferreira da Veiga having departed this life, he came forward in the name of his constituent, who is the second-named executor, to sign the Act of Acceptance of the aforesaid executorship, binding his constituent to the fulfilment of the testament according to the law of inheritance, to render an account of the charitable bequests at the Administration within the legal term, and to pay the conveyance duty, if any be due. The said Bento José Cardozo, being thus clothed with the requisite legal authority, has entered upon the duties of the executorship in Portugal.

Dr. Bayford moved for probate of the will of the deceased *Morrison*.
to Senhor Bento José Cardozo; and

The COURT granted the Motion.

Thomas, Proctor.

High Court of Admiralty.

MAY 23, 1850.

Collision. — **THE "BENARES" (BROWN).**—*Motion.*—This was originally a cause of damage, in which four actions were entered against the vessel and her freight on behalf of different owners of the cargo on board the *Royal Archer*, the vessel sunk in a collision with the *Benares*, and of the crew of the former vessel, and bail was given to those actions in the sum of £8,950. The vessel proceeded against was appraised by commission at the following sums: before damage, £2,765; after damage, £2,655. On the 20th March, after bail had been given, the Proctor for the *Benares* brought in an affidavit setting forth the gross amount of freight on the homeward voyage at £2,538. 12s. 9d., and claiming to deduct, for commission, £25. 7s. 7d.; for wages, £544. 10s., and for dockage, pilotage, towage, and other similar charges, £85. 14s. 6d.; leaving a net freight of £1,889. 0s. 8d. On the 25th April, the Court, at the hearing of the cause,* condemned the owners of the *Benares* in the damage proceeded for to the extent of the value of the vessel and freight; and on the same day their Proctor brought in a further affidavit as to the freight on the outward as well as the homeward voyage; namely, outward voyage, £650; homeward voyage, £2,538. 12s. 9d.; making a total of £3,188. 12s. 9d.; but claiming deductions to the amount of £2,466. 10s. 5d., leaving a net amount of freight of £722. 2s. 4d., on the outward and homeward voyage, from Liverpool to Bombay and thence to Calcutta, and back to Liverpool, occupying ten months. The deductions were for outfit for the voyage, sails and cordage, provisions, insurance on ship and freight, disbursements at Calcutta and St. Helena, wages of crew, disbursements at Liverpool, including commission on collecting freight, besides sundry charges.

* *Antea*, p. 536.

On the 16th April, after the pleadings in the action by the owners of part of the cargo had been concluded, and when the proofs were brought in, an action was entered on behalf of the owners of the *Royal Archer* and the owners and shippers of other parts of the cargo. The Proctor for the *Benares* appeared to this action, but no bail was given, and the Proctor for the parties proceeding in such action sought to participate rateably with the other parties in the value of the ship and freight. The amount of damage was £90,000.

Dr. Addams and *Dr. Bayford*, on behalf of the parties proceeding in the original action, now moved the Court to decree a Monition against the Bail to bring in the sum of £2,598. 12s. 9d., the gross amount of freight earned by the *Benares* on her homeward voyage.

PER CURIAM.—If the Counsel for the owners of the *Benares* think they can maintain their claim to have the whole freight, outward and homeward, brought in, and to have all the deductions considered, I am ready to hear them; if not, it comes to a simple question, what is the amount of the homeward freight, and what are the deductions which ought to be made out of the homeward freight?

Dr. Robinson and *Dr. Twiss*, for the owners of the *Benares*, claimed to deduct the charges necessarily incurred in earning the homeward freight; citing the "*Triune*,"* the "*Gaselle*,"† the "*Alina*,"‡ and *La "Constancia."*§

DR. LUSHINGTON.

JUDGMENT.

The question in the present case arises out of the following circumstances. An action for damage was brought against the *Benares*, and in that action the plaintiffs were successful. The ship and the freight are, of course, generally speaking, responsible for the amount of damage. It turns out that this much exceeds the value of the ship and freight, and the question is, whether the whole of the freight ought to be brought into the Registry, or whether

* 3 Hagg. A. R. 114.

‡ 1 Rob. jun. 111.

† 2 Rob. jun. 279. 3 Notes of Ca. 75.

§ 4 Notes of Ca. 512.

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MAY 23.
Bénarès.

any and what deductions ought to be allowed from it. I understand it is the wish of the parties that I should give my opinion on the Motion as it now stands, without any reference to the Registrar and Merchants. I think the parties are quite right in entertaining that opinion, because the reference would be perfectly useless, the case depending on a question of law, and not on a question of fact.

This is not an unimportant case; I cannot find that the question has ever been formally decided. It must be borne in mind, in the consideration of this case, from beginning to end, that we are speaking of an action where the plaintiffs have been successful in a case of *damage*. We must carefully distinguish it from a case of wages, or of bottomry, or any other case of a purely civil nature. It is very well known that, prior to the passing of the Act to limit the responsibility of owners of a ship doing damage, they were liable to the whole extent of that damage, whatever it might be; and no doubt that was a sound principle of law, because the owner was only made responsible for the negligence or wilfulness of his own servants, and, *primæ facie*, there was no reason why that responsibility should be limited at all, inasmuch as the consequence of limiting it was, that a person having suffered injury, loss, or mischief from the improper act of the owner, was deprived of a part of the remedy, or, in other words, was left without the means of reimbursing himself for the loss so improperly occasioned. However, the Legislature deemed it wise, for reasons which it is not necessary to examine, to limit the responsibility; and we must recollect, in construing this Act of Parliament, that it is prescribing a limitation not merely upon the law as it stood before, but it is an intrenchment, so far as it goes, on the general principle, of every man being entitled to recover the whole of his loss from the individual who inflicts it. The words of the Act 53 Geo. 3, c. 159, are, "That no person or persons who is, are, or shall be, owner or owners, or part owner or owners, of any ship or vessel, shall be subject or liable to answer for or make good any loss or damage arising or taking place by reason of any act, neglect, matter, or thing done, omitted, or occasioned, without the fault or

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Boston

privity of such owner or owners, which may happen to any goods, wares, merchandise, or other things laden or put on board the same ship or vessel, or which may happen to any other ship or vessel, or to any goods, wares, merchandise, or other things, being in or on board of any other ship or vessel, further than the value of his or their ship or vessel, and the freight due, or to grow due, for and during the voyage which may be in prosecution, or contracted for, at the time of the happening of such loss or damage." The question is, what is the meaning that ought to be attached to the word "freight" here? whether it means the whole freight, whatever it might be, due in the course of the voyage, or whether any and what deductions are proper to be made out of it?

It may be well to consider, first, whether this question has in any degree been decided on any former occasion which would be a guide to me; but I confess, after having examined all the cases which were cited, it appears to me that the question is still left without any decision whatever. In all the cases cited, one must bear in mind whether or not the owners of the ship which had done the damage were or were not solvent persons; because questions of exceedingly great difficulty might arise, which I do not mean to anticipate, except by saying that, as questions of towage, wages, and salvage may all be mixed up in bankruptcy cases, I do not mean to bind myself by any observations I am going to make on any of those complicated questions.

So far as appears to me, I am left to decide this question upon principle and upon the construction of the Statute, without being aided or assisted by any case that I am aware of decided in this Court, and certainly not in Courts of Common Law; because no such question could arise there. At common law, there is no lien on the freight, as there is here. If an action for seamen's wages is brought at common law, it is simply a question of contract, whether or not the service has been performed, and therefore the amount of freight and deductions from it never could be the subject of consideration in that point of view at all, neither could this question be there considered in cases of damage. It is

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MAY 26.

Benavet.

well-known that a sailor has a treble remedy,—against the owner, against the ship and freight, and against the master. I am not aware, therefore, that where there is this treble benefit, it would be considered in another Court that there was any peculiar claim against the freight, though, undoubtedly, in this Court it has always been held that the mariner has a lien on the freight.

This being so, let us consider what the words of the Statute are: “The value of his or their ship or vessel, and the freight due, or to grow due, for and during the voyage.” There is nothing said as to how we are to ascertain the value of the ship, or the amount of the freight, or whether any deductions shall take place or not. I apprehend it is quite clear that no deduction can be made on account of the ship, for bottomry, mortgage, pilotage, or towage, or any other demand. Then why should such deduction take place on account of freight? Why should it be said that the one is the gross freight and the other is the net? Why the wages of the crew, anchorage, boat-hire, pilotage, and towage, should be more chargeable against the freight than against the ship, I confess I am at a loss to understand. It appears to me, if there were any doubt as to the solution of a question of this kind, that I should construe this Act of Parliament with reference to the intention of the Legislature—how far they would in reality damnify a person who had already suffered an unjust loss. The Legislature has already limited his power to recover, in words; but am I to go further, and limit by my construction that right which he originally had as a matter of justice and equity, and according to the practice of all the Courts of this country? I am bound to construe this Act as leaving the ancient law, which unquestionably was founded upon principles of justice, as nearly as it was before—giving effect and force to the literal meaning of the terms used by the Legislature itself. I cannot extract from these terms that there was any intention whatsoever to allow all the expenses which would be incurred during the voyage on the part of the owners of the ship to be deducted from the freight; certainly not from the ship; *ergo*, I think, not from the freight. There-

Deductions
disallowed.

fore, I am of opinion that the whole of the homeward freight is liable to make good the damage which has been incurred.

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MAY 23.
BONAPARTE.

THE "BONAPARTE."—*Cause, by Act on Petition.*—This Bottomry.—
was a cause of bottomry, the facts of which are fully set A bond granted
forth in the Judgment. in the country where the
The case was argued, on two occasions (Dec. 5, 1849, owner of the
and 5th February, 1850), at considerable length, by *Drs.* ship resided.
Jenner and *Twiss*, for the bondholders; and *Drs. Addams*
and *Robinson*, for the owners of part of the cargo.

DR. LUSHINGTON.

JUDGMENT.

This is a proceeding against the ship, freight, and cargo, at the instance of Messrs. Wilson and Co., of Hull, as the legal holders of a bottomry-bond. On the 25th April, bail was given on behalf of Messrs. Wilkinson, Whitaker, and Co., in £650, the amount of the action, they being the owners of part of the cargo, consisting of iron. This bail was also given for this part of the cargo, and for the freight due thereon. From the 25th April until the 1st June, the proceedings went on *in parvam* against the ship, and the remaining part of the cargo; the third default being granted on the 24th May. On June 1st, Mr. Gostling, on behalf of the bondholders, brought in his Act on Petition; and I apprehend the propriety of taking that step depended entirely upon the value of the ship and freight, as compared with the amount of the bottomry-bond; for if the ship alone was of sufficient value to answer the bond, there could be no sufficient reason for proceeding against the cargo. I do not mean that the cargo should not have been arrested;—certainly not, for it was quite fitting, in the first instance, to make secure the whole property over which the bond extended; but having obtained bail for the cargo, and the action against the ship not being defended, the suit, as against the cargo, should have been suspended until the ship had been sold, and it had been ascertained whether there was

1860.
MAY 22.
Bonaparte.

any deficiency or not. This should have been the course, unless it was quite manifest that the whole proceeds of the ship would have been insufficient to pay the bond. And the reason is quite clear; because, where a bottomry-bond attaches upon a cargo, that cargo cannot be made subject to the payment of the bond until the proceeds of the ship and freight have been exhausted. The ship is the primary fund, the cargo the secondary; therefore, if the ship be sufficient, proceedings against the cargo are wholly unnecessary and useless. The same principle applies if the freight is not exhausted; as was decided by Lord Stowell, in the case of the "*Prince Regent*."* The present case becomes more complicated in consequence of the bail being given for a part of the freight; but still that fact does not affect the question of the primary application of the proceeds of the ship.

On the 12th June, the Answer to the Act was brought in by Mr. Coote, and I think, had he been aware of the state of circumstances, he ought not so to have done, but to have prayed the Court to stay proceedings against the cargo till the ship had been sold and a deficiency ascertained, the only case in which the cargo would be liable. I think, therefore, that both parties did not see their way clearly, and consequently, much time has been lost, unnecessary expense incurred, the ship deteriorated, and possibly, if the bond be valid as to the cargo, the cargo made answerable unnecessarily. I must now look at the other proceedings, to ascertain whether the bond be or be not good as against the cargo.

The original Act stated that the ship belonged to Undewalla, in Sweden; that she sailed from Gottenburg for Hull on the 19th November, laden with iron and deals; that, in consequence of disasters at sea, she was compelled, at the latter end of November, to take refuge in Rosas Bay; that on the 3rd December she proceeded to Stromstad, where the cargo was unladen, and great repairs were found to be necessary. The master, as stated by the Act, then

* Not rep.

went over to the owners, about sixty miles off, who were unable to furnish him with the necessary funds; but it turns out that he went from Romsø Bay before the ship reached Stromstad; and the owners then desired him to borrow money on bottomry. He went to Stromstad, and applied to Mr. Torin, who advanced the sum of £392. 15s. 11d. on a bottomry-bond dated March 26th, 1849, and which purports to bind ship, freight, and cargo; the interest is to be at fifteen per cent. The ship left Stromstad, and reached Hull on the 7th April. The Act further alleges, that the bond, so granted with the consent of the owners, is valid by the law of Sweden, although such owners resided in the country where the bond was granted. The Answer to the Act is exceedingly brief. It denied that the bond was valid according to the law of Sweden, as related to the cargo, and alleged that it was given for a former debt; that the whole of the cargo belonged to British subjects, and that, for these and other reasons, the bond could not be enforced by this Court.

On these pleadings the case came before me. The evidence on the part of the owners of the cargo did not support the defence; but affidavits were offered as to matters not contained in the Act. One of them, made by a person named Warne, stated that the ship had never been repaired since she was built, and that appeared to be about twelve months ago; that her sails were old, and her value was not more than about £200. There are two other affidavits to the same effect. In the Act on Petition it had been stated, and I am sorry to say erroneously so, that she was of the burthen of fifty-two tons only; a circumstance not unimportant, because, if true, the vessel could have been of very small value; and all these statements led to the suspicion that the cargo had been improperly sacrificed. The Court, therefore, thought it right that further inquiry should take place, and surveys and appraisements were made. The vessel has since been sold, pursuant to an order of the Court, and has fetched a sum considerably less than the bottomry-bond; consequently there is, including the freight, a deficiency, for which the cargo, if the bond is valid against it, is liable.

1850.
MAY 23.
Dunbart.

1850.
MAY 23.
—
Bonaparte.

Then, how does the case stand with respect to the various grounds of opposition which have been raised? First, as to the averment that the bond was given for an old debt, there is no evidence to support that statement. Secondly, that the bond, as affecting the cargo, was invalid by the law of Sweden. The evidence supports its validity, and there is no conflicting testimony. I do not think it necessary to pronounce any opinion upon this question of Swedish law, because I think that the validity of the bond must be determined by the general law maritime, and not by the municipal law of the country where it was granted, so far at least as any question arises upon the obligatory effect of the bond upon persons not being Swedish subjects. Thirdly, with regard to the averments in the affidavit, that the ship was a new one, and that no repairs had been done and no new sails furnished; this charge is wholly disproved by the evidence—indeed, it is not supported at all. Fourthly, with respect to the value of the ship herself, she is of the burthen of fifty-two Swedish lasts, or about 120 tons. Prior to the repairs, and after the damage, she was valued at Stromstad at £416, and after the repairs at £666. I see no reason to believe that these documents are fraudulent, and I cannot without external or internal evidence assume them to be so. If this vessel was of the value herein stated, or nearly so, at the time the bottomry-bond was taken, there is an end of all suspicion that it was granted unduly, merely to make the cargo bear the expenses of the ship, for the ship alone would have been sufficient, even without the freight, to have defrayed the amount of the bond. As this is the real point of the inquiry, I need not examine the surveys and appraisements made here, for they cannot affect the *bona fides* of the transaction in Sweden, nor of course the state of the ship. I am satisfied that there is no proof of any fraud practised for the purpose of saddling the cargo with the expense of repairing a ship not worth repair. Had the ship been sold here, therefore, without incurring any expense, as soon as the proceedings would have allowed, I think the deficit, if any, would have been very small.

The case, then, comes to this: there being no fraud

proved, is the bond invalid by the general maritime law, as relates to the cargo, by reason of such bond being granted in the country of the owner of the ship, and no notice being given to the owners of the cargo? I am of opinion that the principle, so far as it extends (for it is not a universal rule), that a bond shall not be granted in the country of the owner of the ship, was chiefly directed to the protection of the owners of the ship, and not to that of the owners of the cargo. Such principle depended upon the facility of communication with the owner of the ship or of the cargo, if resident in that country; but where the owner of the cargo was resident abroad, the principle could not apply, and especially not in this case, where the owner of the ship was a consenting party.

The last objection is, that the cargo ought to have been transhipped, or communication made to the owners of the cargo. It is quite clear that there is no general obligation on a master to tranship; and here, judging from the papers before the Court, the question was considered by the authorities at Stromstad; but it appears that information was given to the shipper of the cargo, and that he refused to advance any money at all. Does the law require that the master should make a communication to the owner of the cargo in England, if, indeed, he knew who was the owner? I know of no authority which renders such a communication imperatively necessary, and I do not perceive that the circumstances of this case particularly required it. It was argued that, if the ship was of the value stated, the money might have been raised on the ship alone; but neither in practice nor in law is the person advancing money on bottomry bound so to restrict his security.

I must pronounce for the validity of this bond, for the objections of fact are not proved, and the objection of law is not, I think, maintainable; and I must give the bondholder his costs. They are due to him as a matter of justice generally, and not the less so in this case, where much of the expense has arisen from the suggestion of facts wholly unsupported by proof.

1850.
MAY 23.
Bonaparte.

Bond pronounced for.

*Uterior proceedings in the case of Gorham v. the Bishop of Exeter.** **GORHAM, CLERK, v. THE BISHOP OF EXETER.** — The following were the further and final proceedings in this case.*

Exeter.

The Judicial Committee of the Privy Council having reported to Her Majesty that the sentence of the Judge of the Arches Court ought to be reversed, and advised Her Majesty to remit the cause to the Arches Court, with the declaration that the Lord Bishop of Exeter had not shown sufficient cause why he did not institute Mr. Gorham, to the end that right and justice might there be done in this matter, pursuant to the said declaration, and Her Majesty in Council having approved of the Report, the cause was remitted accordingly. The following is the form of the Remission :—

Remission to
the Arches
Court.

Victoria, by the Grace of God of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith ; To our Right Trusty and well-beloved Councillor, Sir Herbert Jenner Fust, Knight, Doctor of Laws, Official Principal of the Arches Court of Canterbury, lawfully constituted, his Surrogate, or some other competent Judge in this behalf, greeting : Whereas the Judicial Committee of our Privy Council, in a certain cause of appeal and complaint of nullity to Us in Council, and by Us referred to the said Judicial Committee, promoted and brought by the Reverend George Cornelius Gorham, Clerk, against the Right Reverend Father in God, Henry, by Divine Permission Lord Bishop of Exeter, from a certain Decree or Order of the said Official Principal of the Arches Court of Canterbury, made and given in a certain cause of Monishing the said Lord Bishop of Exeter to admit the said Reverend George Cornelius Gorham, Clerk, to the Vicarage and Parish Church of Brampford Speke, in our County of Devon, Diocese of Exeter, and Province of Canterbury, and to institute and invest the said Reverend George Cornelius Gorham, Clerk, in the Vicarage aforesaid, with all its rights, members, and pertinents, and to cause the said Reverend George Cornelius Gorham, Clerk, to be inducted into

* See the judgments in the Arches Court of Canterbury, and in the Supreme Appellate Court, the Judicial Committee of the Privy Council, *antea*, p. 187, and p. 413.

the real actual and corporal possession of the same, or to show reasonable and lawful cause to the contrary, rightly and duly proceeding, on the Eighth day of March instant, did agree to report to Us their opinion in favour of the said Appeal, that the Decree or Order of the said Official Principal of the Arches Court of Canterbury, appealed from, ought to be reversed, and that it ought to be declared that the said Lord Bishop of Exeter hath not shown sufficient cause why the said Reverend George Cornelius Gorham, Clerk, should not be instituted to the Vicarage of Brampford Speke aforesaid, and did further agree to report to Us their opinion that the principal cause ought to be remitted to the said Official Principal of the Court from which the said appeal was brought, to the end that right and justice might be there done and administered in the premises, in pursuance of such declaration: And whereas, on the Ninth day of March instant, We were pleased, by and with the advice of our Privy Council, to approve the said Report, and of what is therein recommended, and to order as it is thereby ordered, that the same be duly and punctually observed, complied with, and carried into execution (Justice so requiring): Therefore, We do give and grant unto you Our License and Authority, and strictly enjoin you, by virtue of these Presents, that you, resuming into your hands the said Cause, with all its incidents, emergents, dependents, and things adjoined thereto and connected therewith, may and do freely and lawfully proceed according to the exigency of the law and the tenor of the said Report and Our order confirming the same, to the end that right and justice may be done and administered by you in the premises, in pursuance of the aforesaid declaration, any Inhibition heretofore issued to the contrary notwithstanding. Given at London, under the seal which We use in this behalf (as to affixing the seal) the sixteenth day of March, in the year of our Lord one thousand eight hundred and fifty, and of Our Reign the thirteenth.

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Court of Queen's Bench.

APRIL 25, 1850.

EX-PARTE THE BISHOP OF EXETER, IN RE GORHAM v. THE BISHOP OF EXETER.—On the first day of Easter Term, 1850, Sir F. Kelly, Q.C., moved the Court* for a Rule

Motion for a Rule for a Prohibition in the Court of Queen's Bench.

* *Coram* Lord Campbell, C.J., Patteson, Wightman, and Erle, JJ.

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to show cause why a Writ of Prohibition should not issue to the Dean of the Arches and to the Archbishop of Canterbury, to prohibit them from carrying into execution the order of Her Majesty in Council, upon the Report of the Judicial Committee. The Court took time to consider, and this day gave its decision.

JUDGMENT.

LORD CAMPBELL, C.J.

This is a motion for a Rule to show cause why a Writ of Prohibition should not issue to the Dean of the Arches, and to the Archbishop of Canterbury, to prohibit them from requiring the Lord Bishop of Exeter to institute the Rev. George Cornelius Gorham to the Vicarage of Brampford Speke, and also to prohibit the Dean of the Arches and the Archbishop of Canterbury from instituting the said George Cornelius Gorham to the said Vicarage, or otherwise carrying into execution an order of Her Majesty in Council, made on the 9th of March, 1850, upon a Report of the Judicial Committee of the Privy Council, in an appeal from the judgment of the Court of Arches, in a suit of *duplex querela* between the said George Cornelius Gorham and the said Lord Bishop of Exeter. Having sat as a member of the Judicial Committee when the appeal referred to was heard, I should abstain from giving any opinion upon the propriety of granting this motion if the application were connected with any point then argued and decided. But the Lord Bishop of Exeter, in his affidavit, states that he was not at the time of the hearing of the said appeal before the said Judicial Committee, nor for some time afterwards, informed or aware of the objection now made; and certainly it never was brought forward, or, as far as I know, thought of, either by the Counsel or the members of the Court, till after the decision had been pronounced. It is, therefore, as new to me as to my learned brothers who now sit on the bench along with me.

The objection is, that Mr. Gorham had no right by law to appeal to the Queen in Council, for the purpose of bringing the case before the Judicial Committee, and that he could only appeal from the judgment of the Court of Arches

to the Upper House of Convocation. If this objection be well founded in point of law, it does not come too late, and the Prohibition ought to be awarded to stay the execution of the sentence; for, on this supposition, the judgment of the Court of Arches against Mr. Gorham remains unreversed, the proceedings before the Judicial Committee and before Her Majesty in Council must be considered wholly void; and, the want of jurisdiction appearing on the face of the sentence, advantage may still be taken of the nullity. But, after a very attentive and anxious consideration of the statutes and authorities relied upon, we are all of opinion that the objection is unfounded, and that the course taken by Mr. Gorham, upon judgment being given against him in the Court of Arches, was a course which it was perfectly competent for him to take for the purpose of having that judgment reviewed.

The case turns almost entirely upon the two statutes, 24 Henry 8, c. 12, and 25 Henry 8, c. 19. Sir Fitzroy Kelly, in his lucid argument, contended that, according to the just construction of these statutes, in all cases which touch the Queen, the only appeal given from the Archbishop's Court is to the Upper House of Convocation; and that this cause between Mr. Gorham and the Bishop of Exeter touches the Queen, because her Majesty is patron of the Living of Brampford Speke. Upon this last point we do not feel it necessary to give any opinion, as we clearly think, that, if the Queen really had an interest in the question, whether Mr. Gorham is or is not of unsound doctrine, her right to present a fit clerk to the Living of Brampford Speke not being in controversy, still there never was given by the Legislature a power to appeal in such a cause to the Upper House of Convocation. Sir Fitzroy Kelly very properly admits that the appeal he contends for was not given by 24 Henry 8, c. 12. That statute was passed when Sir Thomas More, a rigid Roman Catholic, was Lord Chancellor, and when Henry had not yet broken with the See of Rome. Therefore, it still allows an appeal to the Pope in all spiritual suits, and was framed upon the principle, that while all temporal matters which were discussed

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in the Ecclesiastical Courts should be finally determined by courts sitting within the realm, the spiritual jurisdiction which belonged to the Pope as supreme head of the Western Church should remain unaffected. Accordingly, this statute is confined to causes about wills, to causes about matrimony and divorce, and to causes about tithes and oblations. Respecting these three classes of causes, it is enacted that the appeal should be from the Archdeacon to the Bishop, and from the Bishop to the Archbishop, whose judgment was to be final—cutting off the appeal to Rome, which otherwise would have lain. The 9th section of the Act provides that, if in the causes before rehearsed there shall be matter in contention which may touch the King, the party aggrieved shall or may appeal to the spiritual prelates and other abbots and priors of the Upper House assembled in Convocation, whose determination is to be final. But an appeal from the Archbishop's Court in a suit upon *duplex querela*, involving the question whether the clerk presented to a Living by the King was of unsound doctrine, would still have gone to Rome. In the following year, Henry, finding that there was no chance of succeeding in his divorce suit with the sanction of the Pope, and being impatient to marry Anne Boleyn, resolved to break with Rome altogether, and, preserving all the tenets of the Roman Catholic faith, to vest in himself the jurisdiction which the Pope had hitherto exercised in England. Sir Thomas More had now resigned the Great Seal, and it was held by the pliant Lord Audley, who was ready to adopt the new doctrine in religion, or to adhere to the old, as suited his interests. In a new session of Parliament, several statutes were passed, which, in addition to further regulating appeals, put a stop to the payment of first-fruits and Peter-pence to the Bishop of Rome; forbade the investiture of English Bishops or Archbishops by the Bishop of Rome; gave power to the King to nominate Bishops in default of election by the Dean and Chapter under a *congé d'élire*; prohibited dispensations or licenses from the Bishop of Rome; and declared the King to be supreme head of the Church, with power to "repress, redress, reform, order, correct, restrain, and amend all such errors, heresies, abuses,

offences, contempt, and enormities, which by any manner of spiritual authority or jurisdiction ought or might lawfully be reformed, repressed, ordered, redressed, corrected, restrained, or amended, for the conservation of the peace, unity, and tranquillity of the realm." The first of these statutes was the 25 Henry 8, c. 19, which put an end to all appeals to Rome in all cases whatsoever, and enacted, by section 3, "that all manner of appeals, of what nature or condition soever they be, or what cause or matter soever they concern, shall be made and had by the parties aggrieved after such manner, form, and condition as is limited" by the former Act of Parliament; that is to say, from the Archdeacon to the Bishop, and from the Bishop to the Archbishop. No exception is introduced respecting causes which touched the King, and, on the contrary, the enactment is expressly extended to all causes, of whatever nature they be, and whatever matter they may concern. But all doubt is removed by the following section (4), which creates a new Court of Appeal for all causes in the Ecclesiastical Courts. Instead of allowing the decision of the Archbishop to be final, as it was by 24 Henry 8, the Legislature now enacted that, for lack of justice in any of the Courts of the Archbishops, it shall be lawful to the parties grieved to appeal to His Majesty in the High Court of Chancery, where Delegates are to be appointed under the Great Seal, who are to adjudicate upon the appeal. This appeal is given in all causes in the Courts of the Archbishops of this realm, as well in the causes of a purely spiritual nature, which might hitherto have been carried to Rome, as in the classes of causes of a temporal nature, enumerated in 24 Henry 8, c. 12. The meaning of the Legislature is still further proved by section 6 of the new statute, which enacts that all manner of appeals hereafter to be taken from the jurisdiction of any abbots, priors, and places exempt from the Ordinary, shall be to the King's Majesty in the Court of Chancery, in like manner and form as heretofore to the See of Rome, no exception being introduced respecting causes which touch the King, although it was then notorious that causes touching the King might be taken to Rome, Pope Clement having

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recently revoked Henry's divorce suit from before Cardinals Wolsey and Campeggio, sitting at Whitefriars, to be determined by His Holiness in the Vatican. The construction which the words of the statute seem to require is expressly put upon them by Lord Coke. In his 4th Institute, p. 349, commenting upon the statute 25 Henry 8, c. 19, this great lawyer says, "A general prohibition that no appeals be pursued out of the realm to Rome or elsewhere. Item, a general clause, that all manner of appeals, what matter soever they concern, shall be made in such manner, form, and condition within the realm as it is above ordered by 24 Henry 8, in the three classes aforesaid; and one further degree in appeals for all manner of causes is given, viz. from the Archbishop's Court to the King in Chancery, when a Commission shall be awarded for the determination of the said appeal, and from thence no further." In practice, such is the construction that has been invariably put upon the statute for above three centuries, without any doubt being started upon the subject till the present motion was made. During this long period of time, there have been many suits decided in the Archbishops' Courts, in which the Crown has been concerned, respecting testaments and tithes, and also of a spiritual nature, if this *duplex querela* touches the Queen. We know that in many of these the decision in the Archbishops' Courts was not satisfactory. According to what is now contended for, the appeal ought to have been to the Upper House of Convocation; but there is no trace of any such appeal ever having been brought. On the contrary, there seems every reason to believe that the appeal has uniformly been to the King in the Court of Chancery, where Commissioners have been appointed; or, in common language, to the "High Court of Delegates."

The causes of this sort which are most likely to occur are testamentary, respecting the administration of the goods of persons who die intestate, without any known relatives. If such persons die intestate, or their wills are invalid, the Sovereign is entitled to the administration of their personal property, and the right of the Crown may depend upon the validity of the wills which they execute, or on questions of

pedigree with claimants who allege themselves to be the next of kin. One instance* will be found in 1 Phillimore, 170, in which the Crown was directly interested, and Sir William Scott appeared as King's Advocate for the Crown. The decision being against the Crown, there was an appeal from the Dean of the Arches to the Court of Delegates; and I am informed by practitioners in Doctors Commons that as often as there has been an appeal in such a suit, it has followed the same course. This statement rests on oral testimony; but there are two precedents to which I can refer with entire confidence, and which, being unopposed by any of a contrary tendency, are, I think, sufficient to show the usage in construing the Statute. The first occurred not long after the Statute passed, and is to be found in Dyer, 278. The appointment of the Dean of Wells being vested by Act of Parliament in the Crown, King Edward 6, by Letters Patent, appointed one Goodman dean, who was thereupon installed. Afterwards, the Bishop of Bath and Wells, acting under the authority of the King, pronounced sentence of deprivation of the deanery against Goodman. There was an appeal to the Archbishop, and he confirmed the sentence of deprivation. Goodman, considering himself aggrieved, resolved to appeal. Now, this suit touched the King, for he was a party to the proceeding, as patron of the deanery. According to the argument at the Bar, the appeal ought to have been to the Upper House of Convocation. But the appeal was to the King in Chancery, and Delegates being appointed, they, after argument, confirmed the sentence. Edward 6, thereupon, by Letters Patent, appointed to the deanery one Turner, who was installed. But on the accession of Queen Mary (Goodman, I presume, being a Roman Catholic, and Turner a Protestant), she, on Goodman's petition, issued a fresh Commission of Delegates to review the sentence of the former Delegates; and, if the appeal ought to have been to the Upper House of Convocation, this proceeding was *coram non iudice*. But the new Delegates reversed the sentences against Goodman, and restored him

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to the deanery. Goodman enjoyed the deanery till the death of Queen Mary. Turner then petitioned Queen Elizabeth for a new Commission of Delegates to review the sentence against him. She granted a new Commission of Delegates, and they removed Goodman, and restored Turner. Goodman petitioned for another Commission of Delegates. This, to show her impartiality, the Queen granted. But the new Delegates finally decided in favour of Turner, and he enjoyed the deanery under their sentence till the time of his death. Much litigation arose respecting the acts of the rival deans while they were respectively in possession. These perplexing questions were debated before Chief Justice Catlyn, Chief Justice Wray, and several other most learned judges. They might have been easily solved by the doctrine that all the proceedings subsequent to the sentence of the Archbishop were null and void, as the controversy ought to have been decided before the Upper House of Convocation. But not a doubt was started respecting the appeal having been duly brought to the King in Chancery under the 4th section of the 25th Henry 8, c. 19, and full effect was given to the sentence pronounced by four successive Commissions of Delegates, in three successive reigns.

The other case to which I refer occurred under my own observation, while I had the honour to hold the office of Chancellor of the Duchy of Lancaster.* A doubt had long existed whether the goods of persons dying in the County Palatine of Lancaster intestate and without next of kin, belonged to the Sovereign in right of the Crown, or in right of the Duchy of Lancaster—a distinction which became of practical importance from the time when, by the arrangement of the Civil List, all the casual resources of the Crown went into the Consolidated Fund, while such revenues belonging to the Duchy were still allowed to go into the Royal Privy Purse. Upon the death of a person in the County Palatine intestate and without next of kin, the claim of a grant of administration of his personal property was made by one Proctor in right of the Crown, and by another in

* *Dyke v. Walsford*, 6 Notes of Ca. 309.

right of the Duchy. In the Court of the Diocesan, the Bishop of Chester, the decision was in favour of the Crown; but on an appeal to the Archbishop of York, the Metropolitan of the province, the sentence was reversed, and administration was ordered to the nominee of the Duchy. There can be no doubt that this cause touched the Queen, for in different capacities she was the sole litigant. The appeal ought, therefore, emphatically to have been to the Upper House of Convocation, if such an appeal could in any case lie. No one dreamed of such a proceeding. The appeal was not brought before the Delegates, only because the Statutes 2 & 3 William 4, c. 92, and 3 & 4 William 4, c. 41, had passed, by which all the powers of the High Court of Delegates, both in ecclesiastical and maritime causes, had been transferred to the King in Council, and the Judicial Committee of the Privy Council had been established, by which, in reality, all such appeals were to be determined. The appeal was prosecuted there exactly as if it had been merely between subject and subject. It was argued at great length before Lord Brougham, Lord Langdale, Mr. Baron Parke, Sir Herbert Jenner Fust, Dr. Lushington, and Mr. Pemberton Leigh. I myself sat at the Bar assisting the Counsel for the Duchy. The Report of the Judicial Committee was in our favour, confirming the Decree of the Archbishop of York, and this was confirmed by Her Majesty in Council. The administration was accordingly granted to the nominee of the Duchy, and the question was considered to be solemnly and legally settled. But if the argument of Sir Fitzroy Kelly ought to prevail, the question must remain doubtful till it is decided by the Upper House of Convocation for the province of York.

Was the language of 25 Henry 8, c. 19, obscure, instead of being clear, we should not be justified in differing from the construction put upon it by contemporaneous and long-continued usage. There would be no safety for property or liberty, if it could be successfully contended that all lawyers and statesmen have been mistaken for centuries as to the true meaning of the Act of Parliament. We have been called upon to recollect that the Upper House of Convoca-

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tion would be a much fitter tribunal than the Judicial Committee to decide such questions as arose in the appeal between Mr. Gorham and the Bishop of Exeter; but if this be so, and questions about wills, about marriages, and about tithes, which must follow the same rule, might likewise be better decided by divines than by Judges regularly trained in the profession of the law, and accustomed to administer justice in other Courts, we cannot be influenced by any view to public policy. Sitting here, we can only interpret the law, and try to discover the intention of the Legislature from the language of the Statute Book. Proceeding upon this principle, we all think that no reason has been alleged to invalidate the sentence in this case, on the ground that the Queen in Council and the Judicial Committee had no jurisdiction over the appeal; and therefore we feel bound to say that a Rule to show cause why a Prohibition should not be granted to stay the execution of the sentence ought not to be granted.

Rule refused.

Court of Common Pleas.

MAY 27.

A similar Motion in the Court of Common Pleas.

THE SAME.—On the 2nd May, *Sir F. Kelly* moved in this Court* for a Rule *nisi* in the same matter and to the same effect.

The Judges having taken time to consider, their decision was given this day.

JUDGMENT.

SIR THOMAS WILDE, C. J.

In the last Term, this Court was moved for a Prohibition on behalf of the Lord Bishop of Exeter, for a Rule

* *Coram* Sir T. Wilde, C.J., Cresswell, Williams, and Talfourd, JJ.

to show cause why a Writ of Prohibition should not issue, to be directed to the Right Hon. Sir Herbert Jenner Post, Knight, the Dean of the Arches, to prohibit him from instituting and inducting the Rev. George Cornelius Gorham to the Vicarage of the parish church of Bramford Speke, in the county of Devon, or otherwise executing a certain order of the Queen in Council made in that respect. This motion was founded on affidavits, which stated that the Queen was the patroness of the Vicarage of Bramford Speke, in the county of Devon, and that Her Majesty duly presented the said George Cornelius Gorham to the said Vicarage, and that the Bishop proceeded to examine the said Mr. Gorham as to his fitness and qualifications for admission, as well in relation to his faith and doctrine, as to his learning, morals, ability, and sufficiency, according to the laws ecclesiastical of this realm, and that the Bishop determined that the said Mr. Gorham did hold doctrines and opinions contrary to the true Christian faith, and contrary to and inconsistent with the doctrines of the Church of England, the Thirty-Nine Articles of Religion, and the Book of Common Prayer, enjoined by the Act of Uniformity, made and passed in the 13th and 14th years of the reign of King Charles 2, and that, by reason thereof, the Bishop had refused to admit and institute the said Mr. Gorham to the said Vicarage; that Mr. Gorham had instituted a *duplex querela* in the Arches Court of Canterbury, and that the Judge of that Court had adjudged and determined that the said Mr. Gorham did hold such unsound doctrines and opinions, and was, therefore, as had been imputed to him, unfit to be admitted, instituted, and inducted into the said Vicarage, and that the said suit was therefore dismissed with costs; and thereupon the said G. C. Gorham had appealed to Her Majesty in Council, and that Her Majesty had been pleased to refer the petition to the Judicial Committee of the Privy Council, and that the said Judicial Committee had reported to Her Majesty that the said judgment ought to be reversed, and that no sufficient cause had been shown why the said Mr. Gorham should not be admitted, instituted, and inducted, and that the cause ought

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to be remitted, that justice might be administered in that behalf: and further, that Her Majesty, by an Order in Council, had ordered and directed that the Report should be observed and carried into execution, and that the case had been remitted accordingly; and that the Official Principal of the Arches Court is preceeding to carry the Report and recommendation into execution, and that the Bishop has been served with a Monition to return the Letters Patent of the presentation of the said G. C. Gorham to the Arches Court, and that the said G. C. Gorham would be admitted, instituted, and inducted by the Archbishop of Canterbury, unless prevented by prohibition from this Court; and that the Bishop was advised that Her Majesty had no authority to refer the petition to the Judicial Committee of the Privy Council, and that the Judicial Committee had no power to consider the matter thereof, or to make any report or recommendation thereon, and that Her Majesty had no power to make the Order in Council, and that the Archbishop of Canterbury has no power, either by himself, or to authorize any other, to admit, institute, and induct the said G. C. Gorham, and that the judgment of the said Dean of the Arches is still in force and effect as a valid judgment, and that the Bishop was not aware that the said Mr. Gorham was not entitled to appeal as beforesaid.

Such are the facts set forth in the affidavit; and the grounds upon which Prohibition is prayed are, that no appeal against the judgment of the Dean of the Arches in this case lay to the Queen in Council, or, in other words, to the Judicial Committee of the Privy Council; but that an appeal from the judgment of the Dean of the Arches could only be made to the Upper House of Convocation.

This question depends upon the construction of the Statute made and passed in the 25th Henry 8, c. 19, which Statute must be construed in connection with the 24th Henry 8, c. 12. By the Statute 24th Henry 8, c. 12, s. 2, appeals from the Ecclesiastical Courts of this kingdom were prohibited to be made to Rome in the classes of causes there mentioned, and were required to be made to the tribunals of the realm, as therein stated, and by section 9 it was

enacted that, in case any cause within the classes of causes therein mentioned should "touch the King," the party grieved should appeal from any of the Courts mentioned to the Upper House of Convocation, and the determination of the Upper House appertaining to the King should be taken for a final decree, &c., never after to come in question and debate, to be examined in any other Court or Courts. By the 25th Henry 8, c. 19, entitled, "The Submission of the Clergy and Restraint of Appeals," it is enacted by section 3, that, after the day therein named, no manner of appeals should be made out of the realm in any causes or matters having their commencement in any Court within the realm, of what nature, condition, or quality soever; but that all manner of appeals, of what nature or condition soever they should be of, and what cause or matter soever they concern, should be made and had after such manner, form, and condition as was limited for appeals in the causes mentioned in the said Statute of the 24th Henry 8, and according to the form and effect of that Statute. By section 4 it is enacted, that, for lack of justice at or in the Courts of the Archbishops of this realm, or in any of the King's dominions, it should be lawful for the parties to appeal to the King in Chancery, and that a Commission should thereupon issue to certain persons to hear and determine the same, and whose determination should be definitive, and no further appeal should be had. By section 6, all appeals thereafter to be had or taken from abbots, priors, &c., houses and places exempt, in such cases as they might aforetime immediately appeal to the Pope,—that in all such cases the party should have the appeal to the King in Chancery, in like manner and form as before was used to the see of Rome.

The present application does not relate to a cause within either of the enumerated classes of causes in the Statute of the 24th Henry 8, but refers to an appeal prescribed and regulated by the Statute of the 25th Henry 8, and such application mainly depends upon the construction of such latter-mentioned Statute; and two principal questions occur to be considered: first, whether the 9th section of the Statute of the 24th Henry 8 (which enacts that in any cause

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within either of the enumerated classes of causes which shall touch the King, the appeal shall be made to the Upper House of Convocation) is to be deemed to be incorporated in or to control the Statute of the 25th Henry 8, and, if it shall be found that such is the correct construction of the Statute of the 25th Henry 8, then a second question will arise, viz. whether this is a case which touches the Queen.

In considering the question whether the 9th section of the Statute of the 24th Henry 8 ought to be deemed to be incorporated in and to control the Statute of the 25th Henry 8, it is to be observed, that where it was intended by the Statute of the 24th Henry 8 to make a distinction in the course to be pursued in appeals in causes which should "touch the King" from that which was to be pursued in all others, it was done in express terms by the 9th section of that Statute, and that provision, with whatever view or motive it was adopted, could not have been out of mind in the framing of the Statute of the 25th of Henry. Further it is to be noted that the 3rd section of the 25th Henry 8, c. 19, is altogether general or universal in its terms, such terms being, "that all manner of appeals, of what nature or condition soever they should be, or what cause or matter soever they should concern, should be made after such manner, form, and condition as had been limited for appeals in the causes mentioned in the 24th Henry 8, and according to the form and effect of that Statute." The words of this section which are relied upon as having the effect of incorporating by implication that which had been enacted by distinct expression in the former Statute, viz. the appeal to the Convocation in matters which touch the King, are the following:—"after such manner, form, and condition as is limited for appeals to be had and prosecuted" by the Statute of the 24th. It is, therefore, to be ascertained, first, what was the "manner and form" limited for appeals by the Statute of the 24th Henry 8.

These words, "manner and form," found in the 5th section of that Statute, in limiting the appeals, are thus used: "They"—that is, the parties to whom the appeal has been given,—“may and shall from thenceforth take, have, and use

their appeals within this realm, and not elsewhere, in manner and form as hereafter ensueth, and not otherwise." The Statute then proceeds to state in substance that all appeals from the Archdeacon are to be made to the Bishop, and if commenced before the Bishop, then within fifteen days to the Archbishop, and there to be definitively adjudged. If commenced before the Archdeacon or Commissary of any Archbishop, then within fifteen days to the Court of Arches or Audience of the Archbishop, and from the Court of Arches to the Archbishop, there to be definitively determined. These provisions are inserted in the printed Statute as three sections, but they are in truth parts of the 5th section, and indicate the respective modes of appeal and the times within which the appeals referred to in the 5th section were to be respectively made. In a subsequent section, preceded by distinct words of enactment, is a provision, that any cause within the enumerated classes which should be commenced before an Archbishop should be finally determined there. Then follows the 9th section, also preceded by express and distinct words of enactment, in which an appeal is given to the Convocation in causes in which the King is touched. The manner and form mentioned in the Statute of the 24th would not appear to have reference to the appeal given in suits which "touch the King."

The word "condition" remains to be considered. This word "condition" is to be found also in the Statute of the 24th, and a reference to that Statute for its meaning (proper in any case, as being the language of a Statute *in pari materia*) becomes the more appropriate on this occasion, as the Statutes are ancient, and the language not that of modern legislation. The 2nd section of that Statute, after enacting that the causes therein mentioned should be determined within the King's jurisdiction, and not elsewhere, proceeds to state that the same shall be determined in such Courts, spiritual and temporal, "as the natures, conditions, and qualities of the cases and matters should require." The word "condition" there is not used in the more common sense of "restriction" or "qualification," but in that of "character," "state," or "quality;" and the object of its introduction is obviously

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rather to amplify than qualify the other language. And so here we think that the word "condition," in this 3rd section of the 25th, had reference to the character and nature of the causes to which the enactment was directed, and did not point at any restriction or exception in the case of the Crown. It would seem, therefore, that the words "manner, form, and condition," in the 3rd section of the 25th Henry 8, were intended to incorporate the manner of proceeding in appeals in general indicated by the former Statute, both as to time and other circumstances, but not to re-enact a particular provision in that Statute distinct from the general manner and form of appeals, to which those words made no particular reference. At any rate, the words may be thus construed; it is a construction which satisfies, if it does not exhaust them, and in such a case it may be doubted whether we are at liberty to give them a larger signification, in conformity with the rule of law which requires that the Crown should be touched, if at all, by express words.

But this is a question we are not called on to decide, for, in our opinion, the section which follows, explained by the usage in several cases, precludes any reasonable doubt. The 4th section enacts, in general terms, that, "for lack of justice in any of the Courts of the Archbishops, it should be lawful for the parties grieved to appeal to the King in Chancery," whereupon the Commission therein mentioned was to issue to determine the same. There seems no ground to authorize a Court of law, in construing this section, to engraft so important a restriction or condition on it as that contended for, there being nothing ambiguous in the language of the section itself, nor any reference to matters extrinsic from which such an intention can reasonably be implied. To adopt the construction contended for, would be to decide that an enactment, distinct and without exception in itself, is to be controlled and limited by the more than doubtful implication to be drawn from a previous section, and this in respect of the Crown, whose prerogatives, it is said, are not to be affected by general words or intendment.

There are some other considerations which throw light on this conclusion. The 6th section provides that appeals from

the jurisdiction of abbots, priors, and other heads of monasteries, and governors of other houses and places exempt, which before the Statute might be made immediately to Rome, should thereafter make their appeals to the King in Chancery, in like manner as they had been used before to do to the see of Rome ; such appeals to be determined by the like Commissioners, as before mentioned. This section is also free from any exception in appeals touching the King, and it does not seem reasonable to suppose that if appeals to the Convocation were to be made in cases touching the King, under the 3rd and 4th sections, they would not have been equally applied to appeals referred to in the 6th section.

It thus appears to the Court that the true construction of the Statute of the 25th Henry 8, c. 19, which applies to the appeal that has been made in this case, is that appeals in all cases under that Statute may be made to the Queen in Council, whether the cause in which such appeal may arise shall or not touch the Crown ; and that therefore, under the authority of the subsequent Statutes, the appeal was properly referred to the Judicial Committee of the Privy Council.

In order to estimate the weight which ought to be given to the arguments and authorities which have been presented to our consideration in support of a different construction, we have thought it right to ascertain by what construction appeals have been regulated since the passing of the Statutes in causes touching the Crown, and we find that the course and practice has been uniform ; that appeals in causes touching the Crown have been made to the King in Chancery, or King in Council, and determined by the Court of Delegates ; and, after due inquiry and investigation, no instance has been discovered of an appeal in such cases to the Convocation, and the report made to us that no such instance can be found derives a great confirmation from the circumstance that, notwithstanding the great interest this case has excited, and the great ability and industry that have been exercised in the course of its prosecution, the applicant has not suggested that any instance has occurred of such appeal to the Convocation.

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The several cases of appeals to the Delegates are proper to be adverted to. There is a case of *the King v. Pigeon*, which was an appeal by the King's Proctor, on behalf of the Crown, to the Delegates, and in which, on the 22nd of May, 1677, sentence was given. The appeal was heard before Wild, then a Judge of the King's Bench; Atkins, a Baron of the Exchequer; and five civilians. It appears that there was a sentence remitting the cause, the King's Proctor dissenting. The case of *the King v. Elbow* was heard in February and March, 1696, before Treby, Chief Justice of the King's Bench; Rokeby and Turton, Judges of the Common Pleas; Oxendon, Judge of the Arches Court; Hedges, Judge of the Admiralty; and three civilians. The Crown claimed to be entitled to the property of the deceased, upon the ground of his having died a bachelor without leaving kin. One party claimed under a nuncupative will, and another party claimed under a written will. The decision of the Prerogative Court was in favour of the written will. The King appealed from that judgment. The case was heard before the Delegates, who also pronounced for the written will, and affirmed the sentence of the Prerogative Court. The case of *the King v. Turke and others* was heard on the 3rd of February, 1695-6, before Sir William Ellis, Knight, and four civilians. The Crown in this case also claimed the goods of an intestate, upon the absence of kin. The case had been heard before Sir Leoline Jenkins, the Judge of the Prerogative Court. The King's Proctor appealed from the sentence to the Delegates; all parties appeared without objection to the jurisdiction. The case was heard before the Delegates, but the Crown did not appear at the hearing, and the sentence was affirmed. The case of *the King v. Weedon and Shales* was heard the 5th of March, 1697, before the Chief Justice of the King's Bench, a Judge of the King's Bench, a Judge of the Common Pleas, the Official Principal of the Arches Court, the Judge of the Admiralty, and three civilians. The case related to the effects of Francis le Peyra, who was a native of France, but who died in London, having left a will bequeathing various legacies to alien enemies, and appointed his brother, John

le Peyra, sole executor and residuary legatee, and in case of his death before the will should be executed, he appointed Weedon and Shales executors. The Crown claimed that administration should be granted to its nominee, by reason that John le Peyra, who had been appointed executor and residuary legatee, and the other legatees, were all alien enemies. Weedon and Shales appeared, and prayed for probate to be granted to them, and the Judge of the Prerogative Court decreed administration with the will annexed to be granted to Weedon and Shales. The King's Proctor appealed to the King in Chancery, and the case was heard by commission before the Delegates, who pronounced for the appeal, and condemned Weedon and Shales to £20 expenses. John le Peyra died before the will was executed, whereupon probate was decreed by the Judge to Weedon and Shales, the executors. In the case of *Waller v. Smith*, and *Heseltine v. Burgh* (1 Phillimore, 170), the Crown claimed the goods, on the ground that Newport had died intestate and was a bastard. One party propounded a will and claimed as executors; another party claimed as next of kin, on the ground of intestacy. The Crown claimed to suspend the proceedings as between it and the next of kin until the suit between the next of kin and the executors should be determined. The Court ordered the proceedings to go on *pari passu*. The case was afterwards heard before Sir W. Wynne, the Judge of the Prerogative Court, on the 4th of December, 1792, when he decreed letters of administration to Waller and Smith, surviving executors of James Smith, one of the next of kin of the deceased. The King's Proctor appealed to the Delegates, and the parties appeared without objection to the jurisdiction. The usual Libel of appeal and process were brought in, and an Allegation was afterwards brought in by the King's Proctor in support of the claim of the Crown. The Delegates, at the prayer of the Respondents, affirmed the sentence and remitted the cause, the King's Proctor not appearing, and having, on the 20th of July, 1797, declined further to prosecute the appeal. The Delegates were Mr. Baron Thompson and certain civilians. There is another case to which reference

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should be made ; that is, the case of *Waldron v. Pollard* (3 Dyer, 273 a), which has been referred to by the name of *Goodman's case*. In that case, the Crown had nominated Goodman Dean of the Cathedral Church of Wells, who afterwards accepted the prebend of Wiveliscombe, in the same church, and, in consequence, was subsequently deprived of the deanery by the Bishop, by virtue of the King's Letters Patent, at the visitation of the Dean and Chapter there. Goodman appealed from that sentence to the Archbishop of Canterbury, who affirmed the sentence of deprivation, and, in consequence, Goodman appealed to the King, and the two previous sentences were affirmed, and of course under a Commission of Delegates. In the reign of Mary, a Commission, at the suit of Goodman, was granted before Delegates, who reversed the two sentences which had been pronounced, and restored Goodman. Turner, who had been appointed to the deanery by King Edward 6 upon the deprivation of Goodman, and who had himself been deprived by the subsequent sentence of the Delegates in the reign of Mary, in the reign of Elizabeth obtained a new Commission to Delegates, and under that Commission the sentence by which Goodman had been restored was reversed, and Turner was restored. Subsequently, upon the petition of Goodman, a further Commission was granted to other Delegates, who affirmed the last preceding sentence, after which Goodman died. It appeared that Goodman had granted certain leases, and two questions arose in the cause,—first, whether Goodman was Dean at the time when he granted the leases ; secondly, whether the leases required confirmation by the King ? It has been said that the case is not perfectly intelligible, and it may be so in certain respects ; but, whatever ambiguity may appear in respect to some parts of the case, there is none in regard to the facts which have any bearing upon the present case ; and they are, that the Crown was the patron of the deanery, and had appointed Goodman, and that upon his (Goodman) being deprived, he appealed to the Archbishop, and afterwards from the Archbishop to the King, upon which appeal the sentences of deprivation were affirmed, which affirmation must of course

have been by Delegates. There were three subsequent appeals against the sentences of deprivation, and all to the Delegates. The first appeal was in the reign of Edward 6; a period very proximate to the passing of the Statutes in question. The second was in the time of Mary, during whose reign the Statutes of 24th and 25th Henry did not exist; and the third and fourth appeals were in the reign of Elizabeth, in the first year of whose reign the Statutes in question were re-enacted and revived; and this case must have occurred soon after the revival of those Statutes; and the case itself, containing the statement of those appeals to the Delegates, is reported by Lord Chief Justice Dyer, to whose authority Lord Coke refers in his 4th Institute, which has been cited, and who became Lord Chief Justice about the time the reviving Statute passed, having been a judge some years before. The first reported case, therefore, that has any relation to the question must have occurred some time before the 10th of Queen Elizabeth, and the last case in the year 1792.

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The cases referred to, excepting *Goodman's case*, it will be observed, all occurred in causes testamentary, being a class named in the 24th Henry 8, c. 12; and yet the appeals, being after the 25th Henry 8, were made to the Delegates, and not to the Convocation. This course clearly would not have been pursued if the 9th section of the 24th Henry 8 had been deemed to be in force, to the exclusion of the appeal given by the Statute of the 25th Henry 8 to the King in Chancery; and, if such was the construction in relation to the enumerated causes in the Statute of the 24th, *a fortiori* the appeal in the present case to the Delegates, which is under the authority of the Statute of the 25th, is free from objection. All the cases which have been named, except the last reported (1 Phillimore, p. 170), occurred when the Court of the Convocation was in more active operation than it has been in modern times, and were heard before eminent Judges; and it cannot reasonably be doubted that reference must have been had to the Statutes in question, and their true construction considered, and that either no doubt was entertained that the appeals to the Delegates were well

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founded, even though the Crown was touched by the cases, or that the construction must have been discussed and determined upon judicially. In either view, they are consistent with the construction now adopted by the Court, and inconsistent with any other. In the case which is reported in the 1st Phillimore, Sir William Scott was the King's Advocate who appealed on his behalf,—one of the last persons likely to have prosecuted an appeal on behalf of the Crown to a wrong tribunal, or to have been unacquainted with the Statutes in question.

In support of the present application, in addition to the arguments offered upon the construction of the Statutes, it was stated that there was a succession of authorities in text-books, truly said to be of great weight; but it will appear, in fact, that all the passages cited subsequently to the time of Lord Coke are referable to the single authority of the 4th Institute, and most, if not all of them, expressly refer to it; and it appears to us that the effect of the several passages quoted has not been correctly appreciated, and that, upon due attention, they will not be found entitled to the reliance which has been placed upon them. It is necessary, therefore, accurately to examine the effect of the passages in the 4th Institute, and it will appear that Lord Coke detailed successively the provisions of two several Acts of Parliament; and what Lord Coke then stated as the provision of one Statute, the subsequent text-writers have adopted as the joint result of both Statutes,—a result upon which Lord Coke himself expressed no opinion. There are several passages in the 4th Institute relevant to this subject. The first is to be found in chap. 74, p. 323, under the head of "The Court of Convocation." In the margin, the "24th Henry 8, c. 12, and 1st Elizabeth, c. 1," are noted; and opposite to these Statutes, and plainly only referring to them, the text states, "if any cause shall depend in contention in any Ecclesiastical Court which may or shall touch the King, the party grieved shall or may appeal to the Upper House of Convocation." And it is to be observed that this passage, which refers to the 24th Henry, inaccurately states, that by that Statute, if any cause shall depend

touching the King, appeal shall be to the Upper House of Convocation, whereas that Statute applies only to certain classes of causes there enumerated. The 1st Elizabeth, c. 1, is only referred to because it repealed a repealing Statute passed in the reign of Philip and Mary, and revived the 24th and 25th Henry 8, and other Statutes. In page 387 of the 4th Institute, under the title of the "The Court of the Arches of the Archbishop of Canterbury," after speaking of the Judge of the Court, the text states:—"He hath ordinary jurisdiction in spiritual causes in the first instance, and by appeal through the whole province of Canterbury, as it appeareth by the Statute of 24th Henry 8, c. 12; and from this Court of the Arches the appeal is to the King in Chancery, by the said Act of 25th Henry 8." It is to be observed that, in this passage, which refers not to one of the Statutes only, but to both, the appeal is stated to be to the King in Chancery, in general terms, and not as subject to any restriction in cases that touch the King. In page 339, under the head of "The Court of Delegates, and consequently of Appeals," there is noted in the margin the Statute of the 25th Henry 8, c. 19, and the text opposite states, that the Court sits upon appeals to the King in Chancery in three causes—"first, when sentence is given in any ecclesiastical cause by the Archbishop or his official; secondly, when any sentence is given in any ecclesiastical cause in places exempt; thirdly, when a sentence is given in the Admiral Court." Thus the three classes of causes are treated as subject to the same appeal, with no exception, it being quite obvious that the second and third classes have no relation to the Court of Convocation. In another passage, in page 339, Lord Coke states that, "as appeals are grounded on Acts of Parliament, it will be pertinent to set down the resolution of the Judges and of the learned in Ecclesiastical Law, which doth sum up in what causes, from what Courts, and in what time, appeals are to be made, and other necessary incidents concerning the same, as the Lord Dyer under his own hand hath reported." And, after this passage, under the head of "Appeals," is noted in the margin the Statute of the 24th Henry 8, c. 12; and then he says, that, in

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causes testamentary, &c., appeals from the Archdeacon shall be to the Bishop, and from the Bishop to the Archbishop, and no farther; and proceeds, under the word "Item, from the Archdeacon or Commissary of the Archbishop to the Arches, &c." Opposite to this passage, in the margin, are the words, "See *infra*; this is altered by the Statute of the 25th Henry 8, in the next page." Then follows, "Item, where the matter toucheth the King, the appeal to be made to the Higher Convocation House, and no further, but finally to be there determined." Then, again, there is quoted in the margin, "25th Henry 8, c. 19," and opposite to that quotation, in the text, are the words, "A general prohibition, that no appeals shall be pursued out of the realm to Rome or elsewhere." "Item, a general clause that all manner of appeals, what matter soever they concern, shall be made in such manner, form, and condition, within the realm, as it is above ordered by the 24th Henry 8 in the three causes aforesaid; and one further degree in appeals for all manner of causes in given, namely, from the Archbishop's Court to the King in his Chancery, where a Commission shall be awarded for the determination of the said appeal, and from thence no further." And again in the margin is a note, "See the page precedent." "Item, that persons exempt shall likewise pursue their appeal in the Chancery *ut supra*, and not to the Archbishop." The author here has merely been setting down the effect of the Statutes in succession, and where he speaks of appeals to the Convocation, it is under the head of the Statute 24th Henry 8. It was not understood when the motion was made that the passages then read referred to particular Statutes noted in the margin, and in fact there is no passage to be found importing that an appeal to the Convocation is given in any case whatever under the 25th Henry 8, c. 19. Such are, it is believed, all the passages in the 4th Institute.

The next authority referred to was Bacon's *Abridgment*, title "Ecclesiastical Courts," letter (B), "Of appealing from an inferior to a superior Court." It there states that "by the 24th Henry 8, c. 12, from the Archdeacon's Court the appeal is to the Bishop; but when the cause is com-

menced before an Archdeacon of an Archbishop, or his Commissary, the appeal is to the Court of Arches." It is then stated, that "by the 25th Henry 8, c. 19, the appeal from the Prerogative Court is to the King in Chancery, who appoints Delegates by Commission to hear and determine the appeal; and it seems, by the same Statute, that an appeal from the Arches is to the King in Chancery." There is a reference in this last paragraph to the margin, and there is there a note, stating, that "by the 24th Henry 8, c. 12, such appeal is to be to the Archbishop; and so is 4th Inst. 341." The text then proceeds thus:—"Also by the 25th Henry 8, c. 19, appeals from the Court of Peculiars, or places exempt, shall be henceforth into the Chancery: if the matter concerns the King, the appeal must be to the Higher House of Convocation." In the margin is quoted, as the authority for this statement, "4th Inst. 339-40," which, as has been observed, does not purport to be an authority that appeals under the 25th Henry 8, touching the King, are to the Convocation, but rather the contrary; and in Bacon, in the passage previous to the statement referred to, when speaking expressly of the 25th Henry 8, c. 19, it is said, without qualification, "The appeal from the Prerogative Court is to the King in Chancery;" and under the head of the "Court of Delegates" there is a paragraph setting forth the 4th section of the 25th Henry 8, c. 19, in terms, without any qualification whatever in regard to the appeal there given from the Archbishop to the King in Chancery. The only passage, therefore, in this book, which gives colour to the argument, is the short paragraph, stating—"If the matter concerns the King, the appeal must be to the Higher House of Convocation," and which refers, as before mentioned, to the passages in the 4th Institute.

Comyns' *Digest* has also been cited, title "Convocation," letter (D), "The Jurisdiction." It is there stated, "in causes ecclesiastical, if the King be concerned, there shall be an appeal to the Upper House of Convocation." This passage also refers, as the authority, to 4th Inst., 339 and 340, and to the title "Prerogative" (D 15). Under this reference, appeal to the Convocation is spoken of, and under that letter, the 24th Henry 8, c. 12, alone is referred

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to, and it is correctly stated that by that Statute, "in causes testamentary, or of marriage, divorce, tythes, &c., which may touch the King, the appeal shall be to the Upper House of Convocation." Neither of these passages, therefore, when accurately examined, is an authority for the position for which they were cited. Under the same head of "Prerogative," in Comyns, title "Appeal" (D 13), the Statute of the 24th Henry 8 is referred to, and after speaking of the appeals given by that Statute, it states, "If the King be concerned, the appeal shall be to the Upper House of Convocation," and refers again to the 4th Inst., 389-40. But the next paragraph is, "and by the Statute of 25th Henry 8, c. 19, appeals shall be made in the same manner in all causes of what nature soever." This paragraph is by no means necessarily to be associated with the paragraph immediately preceding it, but may be well satisfied by its being referred to the Statute of the 24th Henry 8, so far as the manner of conducting appeals is regulated, especially as under (D 14) both Statutes are referred to, and the fourth section of the 25th Henry 8 and the sixth section of that Statute are quoted without any qualification or restrictions whatever in regard to causes touching the King; but, on the contrary, immediately after the citation of those two sections, it is stated, "and, therefore, in all ecclesiastical causes an appeal lies to the Delegates." Upon the whole, therefore, C. B. Comyns is by no means an authority that the appeal in the present case did not lie to the Delegates—rather the contrary.

Wooddessaon's *Lectures* was also referred to, vol. i., p. 76. The author, in speaking of the Act 25th Henry 8, c. 19, and of the Convocation and the King's right to prorogue and dissolve it, proceeds: "By the same prerogative, the King is the ultimate judge in matters and causes ecclesiastical. If, indeed, the cause affect the King, an appeal may, by the Statute of the 24th Henry 8, c. 12, be brought to the Upper House of Convocation;" thus speaking as if by that Statute an appeal to the Convocation was given in all cases, which, as before seen, was never the case. He proceeds: "This provision does not seem abrogated by the subsequent Sta-

tute of the 25th Henry 8, c. 19, by which appeals are to be made from the Archiepiscopal Courts to the King in Chancery;" and reference here is also made to the foundation of all these extracts, the 4th Inst., pages 339-40. The authority of this passage, referring only to the 4th Inst., before observed upon, cannot be deemed entitled to any weight.

Burn's *Ecclesiastical Law* was likewise mentioned. In Vol. i., under the title "Appeal," in page 58, the second and fourth sections of the 24th Henry 8, c. 12, are set out, also with a reference to 4th Inst., 339. In page 59, the 25th Henry 8, c. 19, secs. 3 and 5, are set out, and in page 61 the fourth section of 25th Henry 8, c. 19, is set out, followed by remarks on the subject of appeal, but which contain no suggestion of any limitation or restriction in any case whatever upon the appeal to the King in Chancery. In page 63, the ninth section of 24th Henry 8, c. 12, is set out, with a reference to 4th Inst., 339-40, but without comment. Immediately afterwards the sixth section of 25th Henry 8, c. 19, is set out as an universal proposition, with a reference to a note at the foot, stating, "Therefore in all ecclesiastical causes appeal lies to the Delegates,—4th Inst., 339." These passages are all that are to be found in Burn applicable to this subject, and the result seems to be that it is an authority rather against the argument than in support of it.

Reference was made to Blackstone, vol. iii., page 67. That author, in relation to the Statute 25th Henry 8, states that that Statute "was but declaratory of the ancient law of the realm," and refers to 4th Inst., 341, and then adds—"But in case the King himself be party in any of these suits, the appeal does not then lie to him in Chancery, which would be absurd; but by the Statute of the 24th Henry 8, c. 12, to all the Bishops of the realm assembled in the Upper House of Convocation." This statement refers to the 24th Henry 8, and the Statute of the 25th Henry 8, c. 19, is referred to in this and other passages in Blackstone generally, and in page 65, in speaking of the Court of Peculiars, he states that, in all ecclesiastical causes cognizable thereby, in which an appeal lay formerly to the Pope, now, by the Statute of the 25th Henry 8, c. 19, the appeal is to the King in Chancery. And again, in

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speaking of the Prerogative Court, it is stated:—"An Appeal lies by the Statute of the 25th Henry 8, c. 19, to the King in Chancery, instead of to the Pope, as formerly." This passage is unaccompanied by any qualification, yet in the passage in page 67, when stating the appeal is to be to the Convocation in any of those suits enumerated in the 24th Henry 8, reference is made only to appeals under the 24th Henry 8, and nothing is said respecting appeals arising under the 25th Henry 8, or of the effect of the 25th Henry 8 upon the appeals under the 24th Henry 8. Blackstone, in thus referring to the Statutes, gives no opinion whatever except upon the 9th section of the 24th Henry 8, upon which, taken by itself, no doubt has ever been entertained. It is unnecessary, therefore, to consider what would have been the weight of an opinion, if expressed, as compared with the practice which has prevailed. In Stephens' edition of Blackstone, vol. iii., 433, the passage in Blackstone before referred to is set out in the following manner:—"But in case the King himself be party in any of these suits, the appeal did not then lie to himself in the Delegates, which would have been absurd; but by the Statute of 24th Henry 8, c. 12, is given"—then the following passage is in brackets—"[to all the Bishops in the province assembled in the Upper House of Convocation]"; and the editor then proceeds to state,—“By the 2nd & 3rd William 4, c. 92, it is now provided that every person who might formerly have appealed under the 25th Henry 8, c. 19, may now appeal to Her Majesty in Council; and by the 3rd & 4th William 4, c. 41, sec. 3, and 6th & 7th Victoria, c. 38, sec. 11, that Her Majesty shall, by Order in Council, direct that all appeals from ecclesiastical or other Courts shall be referred to the Judicial Committee of the Privy Council.” This passage cannot be referred to as any authority, whatever respect is due to the very learned editor; but his opinion as to the effect of the recent Statutes is intimated with sufficient distinctness.

Ayliffe's *Parergon* was also cited; but the reference was not given, and the only passage that appears to have any application is in pages 83, 84, where the Statute of the 24th

Henry 8 only is mentioned. In page 83 the Statute is mentioned, and it is said, that, for avoiding delays in appeals in causes testamentary, matrimonial, tithes, &c., which concern the King or any other person, the same should be formally determined within the King's jurisdiction; and then, after the regulations of the Statute as to the order of appeals, and the time within which they are to be made, he proceeds: "And if the cause or suit concerns the King, the party grieved may within fifteen days appeal to the prelates assembled by the King's writ in Convocation then next in being or ensuing;" and it is added, "See the Act itself." Such is the only passage to be found, and it will be observed that the author has never at all referred to the Statute upon which the question solely depended, *i.e.* 25th Henry 8. He mentions the 24th Henry 8 inaccurately, by stating that the appeal to the Convocation must be made in fifteen days, but his remarks are confined to the appeal to the Convocation in the causes mentioned in the Statute of the 24th Henry 8, of which causes this is not one. If all consideration of the 25th Henry is excluded, of course no doubt exists in regard to the causes mentioned in the 24th Henry. .

The principal authorities presented to the Court upon the application for this Rule have now been referred to, and upon a deliberate review of them, no one refers to or is founded upon any judicial decision or *dictum*, nor do they appear to be the result of an examination of the effect or construction of the two material Statutes in connection; but, as before stated, some of them merely give the section of each of the Statutes, and others state the effect of a provision in one of the Statutes, as though it was the result of the provisions of both. They cannot, therefore, properly have any effect in controlling a construction which appears to us to be warranted by the language of the Statute of the 25th Henry 8, and to be supported by and consonant with a course of construction and practice beginning in the reign of Queen Elizabeth (a comparatively recent period after the Acts of Parliament in question came into operation), and continued in 1812, that practice having occurred before several Judges of great eminence, and being unopposed by a single instance con-

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sistent with the opposite construction, or a single judicial dictum ; and it does not appear that any Book of Practice or Forms relating to appeals contains any form or direction applicable to the prosecution of an appeal under these Statutes to the Convocation.

In determining upon the present application, we have attentively considered the circumstances under which it comes before us. The litigant parties have concurred in prosecuting the appeal to the Judicial Committee, and, after a decision has been come to, an objection is for the first time made, upon the ground of a want of jurisdiction in the tribunal. The case was elaborately moved before the Court of Queen's Bench ; that Court has pronounced a deliberate judgment upon the construction of the Statutes, and the applicant has since exercised his undoubted right of making a similar application to this Court ; and when so doing, the learned Counsel who made this motion brought before us all the authorities that there is any reason to suppose have any bearing upon the subject, and the Court of Queen's Bench having stated that there were several instances of appeals to the Delegates, founded upon the construction adopted by that Court, nothing was presented to us during the arguments in support of the application tending to create any doubt of the accuracy of that statement, although we cannot but suppose that due investigation was made as to the fact of such instances having occurred, and of their applicability to the case ; and we have informed ourselves of the particulars of those cases, as before detailed, and further no appeal has been discovered to have been made to the Convocation. Under these circumstances, we have every reason to conclude that further discussion will not furnish additional information or light upon the subject ; and passing by any other question to which the application might be subject, and founding our decision simply on the construction of these particular ancient statutes, as supported by the usage in the only instances of appeals in matters touching the Crown known to have occurred since they passed, we think that it would not be consistent with the due discharge of our duty, but would only tend to prolong an useless liti-

gation, to grant any Rule. The late appeal in the case of the Duchy of Lancaster has not been enumerated among the instances of appeals conformable to the construction of the Statutes adopted by the Court, because it has occurred to us, that, if the question was, in which of two rights the Crown was entitled to the subject matter of the subject, the litigation may not have been of that contentious character which would render the case an authority in support of the jurisdiction to which appeal was then made.

The judgment of the Court, therefore, is, that there be no Rule in this case.

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Court of Exchequer.

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THE SAME.—On the 6th June, *Sir F. Kelly* made a similar motion in this Court,* which took time for consideration.

A similar Motion in the Court of Exchequer.
June 11.

SIR F. POLLOCK, C. B.

The Court has anxiously considered the question moved on Thursday last by Sir F. Kelly. The importance of the case on the one hand, and the great weight justly due to the concurrent opinions of two Courts on the other hand, require from us the utmost deliberation before we proceed either to grant or refuse the Rule. But to-morrow is the last day of Trinity Term, and the long vacation, which follows it, would, in case we should ultimately grant a Rule *nisi*, prevent this question from being concluded before next Michaelmas Term,—a delay very prejudicial to all parties. We are by no means prepared to differ from the judgments already given, but, before we pronounce our own opinion (whatever that may be), we think it right that we should ourselves refer to, and carefully examine, all the

* *Coram* Sir F. Pollock, C. B., Alderson, Rolfe, and Platt, BB.

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authorities cited, and this, as yet, we have not had sufficient time to do. Under these circumstances, inasmuch as by granting a Rule *nisi* to-day, returnable peremptorily to-morrow, we can, at the sittings after the present Term, deliberately hear and determine this Rule (as a motion pending during this Term), and so pronounce our considered judgment before the circuits begin, we propose at once to take that course. If it were not for the peculiar season of the year, we should have deliberated further before we took this step. The course we mean to pursue will, however, give us the advantage of further information, if any can be afforded, and particularly on one point, not apparently much adverted to in the previous discussions, namely, whether, even supposing the 9th section of the 24th Henry 8 to be still in force, and to apply to such a case as this, this is a "cause, matter, or contention" which touches the King,—a point on which several of us at present entertain very grave doubts. We shall arrange with Mr. Baron Parke to take the Guildhall sittings on Saturday, June 29, and the following days, until the arguments in this case are ended; and we ourselves shall meet at this place and sit from day to day till cause has been shown, and this Rule has been disposed of.

Rule *nisi* accordingly.

June 29.
July 1 and 2.

Cause was shown, on behalf of the Archbishop of Canterbury, the Dean of the Arches, and Mr. Gorham, by Sir J. Jervis, A.G., Greenwood, and Comling, against the Rule, which was supported by Sir F. Kelly, Q.C., Martin, Q.C., Peacock, and Badeley.

The Court took time to consider its judgment.

July 8.
JUDGMENT.

SIR F. POLLOCK, C.B.

This is a Rule *nisi*, granted at the instance of the Lord Bishop of Exeter, to prohibit Sir Herbert Jenner Fust, Knight, Dean of the Arches, and the Lord Archbishop of Canterbury, from admonishing the Lord Bishop of Exeter from proceeding to enforce or give effect to any Monition requiring the said Bishop to transmit or cause to be transmitted to the Registry of the said Arches Court the Letters

of Presentation of Her Majesty Queen Victoria, addressed to the said Lord Bishop of Exeter, and presenting the Rev. George Cornelius Gorham, clerk, for admission, institution, and induction, by or under the authority of the said Bishop, to the Vicarage of Brampford Speke, in the county of Devon, and in the diocese of Exeter; and also to prohibit the said Sir Herbert Jenner Fust and the said Archbishop of Canterbury, and each of them, from admitting, instituting, or inducting, or authorizing the admission, institution, or induction, of the said George Cornelius Gorham to the said Vicarage, or in any way proceeding to give effect to a certain order of Her Majesty in Council, in the affidavits mentioned, upon a certain Report and recommendation of the Judicial Committee of the Privy Council, in a certain cause, or alleged cause, of appeal from the judgment of the said Arches Court, in a suit of *duplex querela* between the said George Cornelius Gorham, clerk, and the said Lord Bishop of Exeter.

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The facts necessary to be stated for a due understanding of the case are as follow:—In the year 1847, Mr. Gorham was presented by Her Majesty to the Living of Brampford Speke, in the diocese of Exeter. The Bishop refused to admit Mr. Gorham, on the ground that he entertained opinions not in accordance with the doctrines of the Church of England. Upon this refusal, Mr. Gorham instituted a proceeding by *duplex querela* against the Bishop in the Court of the Archbishop of Canterbury, complaining of the decision of the Bishop, and alleging that he entertained no doctrines inconsistent with those of the Church. The case was heard before Sir Herbert Jenner Fust, Dean of the Arches, who dismissed the complaint, and confirmed the decision of the Bishop. Mr. Gorham then appealed from the judgment of Sir Herbert Jenner Fust to Her Majesty in Council, and the case was by Her Majesty referred to the Judicial Committee of the Privy Council, by whom it was heard at great length in the month of February last, and in the month of March the Judicial Committee reported in favour of the appeal, and made a recommendation to Her Majesty accordingly, upon which Her Majesty, on the 9th of March, issued

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an Order in Council to carry into effect the Report and recommendation of the Judicial Committee.

The appeal to Her Majesty in Council was grounded on the Statute 2 & 3 William 4, c. 92, which abolished the Court of Delegates created by 25 Henry 8, c. 19, s. 4, and enacted that all appeals which might have been made to that Court should thenceforth be made to the King in Council; and by the subsequent Act of 3 & 4 William 4, c. 41, s. 3, all such appeals are to be heard by the Judicial Committee.

At the beginning of last Easter Term, the Bishop of Exeter applied to the Court of Queen's Bench for a Prohibition, to prevent any further proceedings on the Order in Council made pursuant to the judgment of the Judicial Committee, on the ground that the matter in controversy was one which touched the Queen, as patron of the Living, and that, in a case touching the Queen, there never was an appeal to the Delegates, and so neither would there now be an appeal to Her Majesty in Council. The Court of Queen's Bench, after taking some time to consider, unanimously refused to grant a Rule. The Bishop then, later in the same Term, made a similar application to the Court of Common Pleas, and that Court, in the following Term, by a unanimous decision, also refused to grant the Rule applied for. The judgments of both those Courts proceeded on the ground that, even supposing the matter to be one which touched the Queen, still there was an appeal to Her Majesty in Council under the Statute 25th Henry 8, c. 19, altered by the subsequent Statute of 2 & 3 William 4, c. 92. The order, therefore, which had been made, was legal and valid, and so the Bishop was not entitled to a Prohibition. Late in the last Term, the Bishop renewed his application for a Prohibition, by applying to this Court, and, under the circumstances of the case, the motion before us being made at a time when it was impossible for us satisfactorily to look into the authorities during the Term, we thought it best to grant a Rule *nisi*, in order that the matter might be discussed and disposed of at the present sittings, instead of being left to stand over till Michaelmas Term, as it possibly

might have done, if we had taken time till after the last Term to consider whether we ought or ought not to grant a Rule *nisi*. The Rule having been thus granted, cause was shown against it on the 29th ultimo by the Attorney-General, Mr. Greenwood, and Mr. Cowling, and on Monday and Tuesday last Sir Fitzroy Kelly, Mr. Martin, Mr. Peacock, and Mr. Badeley, were heard in support of the Rule, and the question now is, whether the Rule is to be made absolute or to be discharged.

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This involves two points:—1. Whether this is a case which touches the Crown; for, if it do not touch the Crown, it is admitted the appeal to the Queen in Council is well founded. 2. Whether in all cases (touching or not touching the Crown) there is an appeal from the Archbishop's Court to the Queen in Council? If there be, then also the appeal to Her Majesty in Council is authorized by law, and this Rule cannot be made absolute. In the Courts of Queen's Bench and Common Pleas, the judgment was founded entirely on the second point; we directed the attention of Counsel to the first point also, entertaining as we then did, and still do, considerable doubt whether the matter touches the Crown or not; but we have thought it unnecessary to decide this point, as we are clearly of opinion that, whether a case of *duplex querela* before the Archbishop be one which touches the Crown or not, there was an appeal given by the 25th Henry 8, c. 19, to the King in Chancery; and, therefore, now there is an appeal to the Queen in Council.

We have arrived at this conclusion by considering what is the combined effect of the two Statutes—24 Henry 8, c. 12, and 25 Henry 8, c. 19, by which last Statute the authority of the Court of Delegates in these matters was first created: for the Judicial Committee, without any doubt, have been substituted for the Court of Delegates, and have (at the least) the same jurisdiction. We will, therefore, begin with the 24th Henry 8, c. 12. By that Act, restraining appeals to Rome in suits testamentary, matrimonial, and for tithes, there is first a general prohibition to all persons, subjects of this realm or residents, to appeal to Rome,

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under a penalty of a *præmunire* ; and then a provision, by the 5th section, that where the King's subjects, or resiants within the King's dominions, had before used to appeal to Rome concerning the causes before mentioned, they (*i.e.* the King's subjects or resiants) should appeal within the realm of England, and not elsewhere, in the manner and form therein-after pointed out, and not otherwise. The Act then proceeds to describe four classes of cases :—1st. Causes coming before the Bishops' Archdeacons, which are to be pursued through the Bishop's Court, and so to the Archbishop's Court, "there to be definitively and finally ordered, decreed, and adjudged, without any other appellation or provocation to any other person or persons, Court or Courts." 2nd. Causes commenced before the Bishops, which go to the Archbishop's Court, in precisely the same terms as to finality. 3rd. Suits commenced before the Archdeacon of the Archbishop, which, after going first through the Court of Arches, are to go before the Archbishop himself, obviously referring to the Court (now obsolete and absorbed in the Court of Arches) formerly held before the Archbishop in person, assisted, as he generally was, by assessors. But this class of cases, also, when arrived at this point, was to be definitively and finally determined without any other or further process or appeal to be therefrom had or sued. The fourth class of cases was of suits commencing (as this present case did) before the Archbishop himself, which were to be definitively determined by him, without any other appeal, provocation, or any other foreign process out of this realm, to be sued to the let or derogation of the said judgment, sentence, or decree, otherwise than by this Act was limited and appointed. This, then, was the state of the law ; by express words, the decision of all these appeals by subjects or resiants grieved might be commenced in various Courts ; but in all of them the decision of the Court of the Archbishop was to be final, otherwise than was by that Act limited and appointed ; and the words were general, and clearly extended (if the Act had, but for the proviso, stopped here) to all suits, whether such as touched the King or such as did not. But then came the 9th section, as a sort of proviso or

qualification of them all. That clause enacted that, in suits touching the King, ventilate, commenced, or begun in any of the said Courts (i.e. Bishops' or Archbishops' Archdeacons', or Bishop's or Archbishop's Courts), the final appeal should be to the spiritual prelates, abbots, and priors of the Upper House of Convocation of the respective provinces where the suit began, and that whatsoever matter there should be determined, appertaining, concerning, or belonging to the King, his heirs and successors, should "stand and be taken for a final decree, and the same matter, so determined, never after to come in question and debate, to be examined in any other Court." The true meaning of this is clearly, we think, to repeal the finality as to decisions in the Archbishops' Courts, in cases which touched the King, leaving it in all other cases.

Then came the 25th Henry 8, c. 19, by which that which had been before confined to three classes of ecclesiastical cases was extended to all. This was done, we think, by the conjoint operation of the two sections, the 3rd and 4th, which, it may be well to observe, form, in the old black-letter editions of the Statute, only one paragraph. It would clearly be incorrect to say that the words of the 3rd section, in their strict literal meaning, can be construed so as to give effect to the obvious intention of the Legislature; for this would be to make the Legislature enact, first, that all these cases should be finally determined without any appeal from the Archbishop's Court; and then, by the 4th section, alter that provision, by giving a further appeal to the Court of Delegates. It is, we think, clearly more simple and more reasonable to say that the two sections taken together mean, that the provisions, as to the form and manner of appeals given in the 24th Henry 8, c. 12, and amended by the 4th section of the 25th Henry 8, c. 19, shall extend to the three classes in the 24th Henry 8, c. 12, and all other ecclesiastical appeals whatsoever; and if we do this, the natural mode of placing the sections in order will be to superadd to the appeal to the Archbishop's Court a new Court of Appeal, thereby repealing the finality of that Court, and substituting in its place the finality of the new Court (viz. the Court of

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Delegates), and the declaration that there shall be no further appeal from them. Now, had the 24th Henry 8 been so framed, it is clear that the Court of Delegates would have been the ultimate Court of Appeal provided by the 6th, 7th, and 8th sections of that Act. The words of the three sections were general, and applicable to causes touching or not touching the King. The words of the section, as to the Court of Delegates, are general also. The Archbishop's Court was by these sections made final. The Court of Delegates is in like manner made final. The proviso in the 9th section altered the finality as to the Archbishop's Courts, but confined that finality to matters not touching the King. It is obvious that a similar effect may well be given to the words which render final the decisions of the Court of Delegates. Indeed, it was admitted at the Bar, and could not be denied, that this order of the sections rendered the case free from all doubt, and that the conclusion (if such were the order) would clearly be, that, in cases touching the King, the appeal would be from the Archbishop's Court to the Court of Delegates. After considering the whole question, we are of opinion that, according to the true construction of the two Statutes, there was an appeal in all cases (whether they touched the King or not) from the Archbishop's Court to the King in Chancery; and, therefore, that there now is an appeal to the Queen in Council.

This also appears to be the result of the most eminent of the authorities cited. In the 4th Inst., p. 337, Lord Coke says, of the Court of Arches, "From this Court the appeal is to the King in Chancery, by the said Act of 25th Henry 8, c. 19," (making no mention of any exception in a case touching the Crown). Again, in that part which treats of the Court of Delegates, p. 339, he says, "These Delegates do sit by force of the King's Commission, in three causes:— 1st. When a sentence is given in any ecclesiastical cause by the Archbishop or his official," (again making no mention of any exception); and lastly, in treating of "Appeals," p. 340, he says (quoting and adopting Lord Dyer's words), "*Item*, a general clause, that all manner of appeals, what matter soever they concern, shall be made in such manner, form,

and condition, within the realm, as it is above ordered by 24th Henry 8, in the three causes aforesaid ; and one further degree in appeals for all manner of causes is given, viz. —from the Archbishop's Court to the King in Chancery."

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So, Comyns' *Digest*, tit. "Prerogative (D 14)," after setting out the section of the 25th Henry 8, c. 19, proceeds thus:—"And therefore in all ecclesiastical causes an appeal lies to the Delegates." Blackstone alone, of all the authorities, says, the appeal, where the King himself is a party, "does not lie to the King in Chancery, which would be absurd ; but by the Statute 24th Henry 8, c. 12, to all the Bishops of the realm assembled in the Upper House of Convocation." The inaccurate manner in which the Statute is quoted affords strong ground for doubting the conclusion of the writer ; and we think the authority of Lord Coke and of Chief Baron Comyns is not outweighed by this reference to Blackstone : indeed, if the passage be taken to the letter, it confines the appeal to the Convocation to those cases in which the King himself is a party,—and it is quite clear that Her Majesty is not a party to these proceedings, and so it would be no authority in this case at all.

The Courts of Queen's Bench and Common Pleas came to the conclusion, that the appeal to the Convocation was altogether abolished by the effect of the second Statute. They both thought that, when, by the express provisions of a. 4, 25th Henry 8, c. 19, a new appeal was given to all parties grieved, without any exception, and a new tribunal was constituted for the purpose, and no further appeal was to be had or made from the same, this was in effect a repeal of the exceptional right of appeal given by the 24th Henry 8, in the particular case of matters touching the Crown ; and, in support of this view of the case, reliance was placed on the fact, that no appeal to Convocation ever has taken place during the three centuries and upwards which have elapsed since the passing of these Statutes ; and, on the other hand, it was shown that in several cases since the reign of Henry 8 (certainly in five, perhaps in more), in which the King was concerned, an appeal has been made to the Delegates without objection.

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The conclusion at which the Courts of Queen's Bench and Common Pleas have arrived seems to us so reasonable a construction of the Statutes, explained as they are by subsequent usage, and contradicted by no contrary practice, that but for the authority of Lord Coke, followed by a great number of other text-writers of eminence, we should at once have adopted it. We feel, however, that the authority of Lord Coke is not to be lightly disregarded, and certainly in the 4th Inst. he speaks of the Court of Convocation as a Court to which there was an appeal, under the Statutes in question, in cases touching the King. This is expressly stated under the head of "The Court of Convocation," in p. 323, and again under the head of "Appeals," in p. 339. It is true that, in the latter passage, Lord Coke is not speaking from his own mind, but is only giving the report of Lord Dyer. But we think it must be inferred, that he meant to adopt as good law what he so states himself to have received from Lord Dyer. What Lord Coke thus states, namely, that in matters which touch the King, there is an appeal to the Upper House of Convocation, has been adopted by a great number of writers of the highest eminence, including Lord Chief Baron Comyns, Ayliffe in his *Perrigon*, and others. These subsequent authorities, it was said, do not add anything to the weight of the original authority of Lord Coke, from whom they obviously took their law, nor do they, save only that their adoption of what had been laid down by Lord Coke proves that they did not doubt its accuracy. It was, indeed, a matter of little or no practical importance, and in all probability they adopted Lord Coke's authority without much, or perhaps any, investigation. Still the result of the whole is, that Lord Coke, writing long after the reign of Henry 8, says there is in matters touching the King an appeal to the Convocation, and many subsequent text-writers of great eminence, down to very modern times, assert the same. In the present case, this is rather matter of curious speculation than of any practical importance, for in either view of the case, the proceedings before the Judicial Committee were well founded, and in either view of the case there can now be no further appeal. If the second

Statute, 25th Henry 8, c. 19, repealed the 9th section of the former Statute, the proceedings questioned by the present application are perfectly regular. So if the second Statute merely gave a further appeal in all cases to the Delegates, equally the proceedings before the Judicial Committee now questioned are regular, and there can now be no further appeal of any sort, as the 3rd section of the 2 & 3 William 4, c. 92, expressly makes the judgment, order, or decree, under that Statute, final and definitive. If we were compelled to decide this question, we should probably come to the same conclusion as the other Courts of Westminster Hall, viz., that in effect the Statute 25th Henry 8, c. 19, did repeal the clause in the 24th Henry 8, c. 12, section 9, which in causes touching the Crown gave an appeal to the Convocation. There is, on the one hand, what appears to us to be a reasonable construction of the Statute, supported by all the practice that is known to exist on the subject, and opposed by none. On the other hand, there is the authority of Lord Coke and the text-writers, that some appeal did exist to the Prelates of the Upper House in causes touching the King; but, as we have observed, this is now practically of no importance. The question before us is, not whether there was, after the passing of the 25th Henry 8, c. 19, some appeal to the Convocation in some stage of causes touching the King, but whether, in all manner of (ecclesiastical) causes, there was an appeal from the Archbishop's Court to the King in Chancery; and we think there was, and that, therefore, there now is to the Queen in Council. Our judgment is founded on what we hold to be the true construction of the Act, and on the eminent authorities already referred to, which, it has been incorrectly stated, lead to a contrary conclusion.

The view we have taken may be fortified by some matters presented to us in the course of the Argument. The section of the 25th Henry 8, c. 19, which gives the appeal to the Delegates, expressly says, a Commission shall be directed "like as in case of appeal from the Admiral's Court." Now, it is well known, that the appeal from the Court of Admiralty to the Delegates has always been of all manner of

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causes, whether touching the Crown or not. It was further noticed that, in the Irish Statute, 28th Henry 8, c. 6, following the course (very generally adopted) of assimilating the law of Ireland to the law of England, the appeal to Rome is taken away, and an appeal given precisely according to the construction of the English Statutes adopted by the Courts of Queen's Bench and Common Pleas. It is true there may not have been a Convocation in Ireland similar in all respects to what existed in this country; but there certainly was a Convocation, and, undoubtedly, there were "Spiritual Prelates," to whom the appeal might have been given, if it were necessary (as it was generally thought to be) to assimilate the practice in Ireland with the practice in England, and if, in fact, there was an appeal in England to the Spiritual Prelates in the Convocation being. Lastly, we may remark that the Statute 25th Henry 8, c. 19, by giving the appeals in all causes ecclesiastical from the Archdeacon to the Bishop or Ordinary, and from him to the Metropolitan or Archbishop, and from him to the King, and no further (if such was the effect of the Statute), did but restore the ancient law of the land, as settled (on this point) by the Constitutions of Clarendon in the reign of Henry 2, *anno Domini* 1164. The Constitutions of Clarendon were directed against the encroachments of ecclesiastical power and the usurpation of the Papal authority, and, next to the great Charter itself, they have been always considered as a security for the independence of the kingdom and the liberty of its subjects. These last observations would not of themselves be sufficient to support our decision, but they add strength and reason to the authorities we have cited, and they illustrate the construction of the Statutes which we have felt ourselves bound to adopt.

On the whole, therefore, entertaining, as we do, no doubt upon the question before us, and concurring with the other Courts of Westminster Hall, and, as far as we know, with every Judge of all the Courts, we do not think that we should be justified in creating the delay and expense of further proceedings with a view to take the opinion of the

House of Lords; and our Judgment is, that the Rule be discharged, with costs.

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Pending the foregoing proceedings, a Monition issued from the Arches Court to the Lord Bishop of Exeter, requiring him to bring in the Letters of Presentation, to the end that Mr. Gorham might be instituted by the authority of this Court, the return to which Monition was, by the Court's permission, suspended until the Rule for a Prohibition had been moved for in all the three Courts of law, when the Counsel for the Lord Bishop brought in the Presenta- July 20.
tion, accompanied by a Protest, which the Court declined to receive. The *fiat* of the Archbishop of Canterbury having been obtained, the Dean of the Arches, in open Court, pronounced that Mr. Gorham was entitled to be Aug. 6.
instituted to the Living, and subsequently, Mr. Gorham being introduced, and having subscribed the Articles and taken the customary oaths, was addressed by the Dean of the Arches to the following effect:—

“We, Sir Herbert Jenner Fust, Knight, Doctor of Laws, Official Principal of the Arches Court of Canterbury, lawfully constituted, do, by virtue of the authority to us committed, admit you, the Rev. George Cornelius Gorham, Clerk, B.D., to the vicarage of Brampford Speke, in the county of Devon, diocese of Exeter, and province of Canterbury; we do give you true, lawful, canonical institution, and do invest you with all the rights and appurtenances thereunto belonging, and do commit to you the care of the souls of the parishioners of the said parish.”

On the 11th August, Mr. Gorham was inducted into the Living.

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4. Between a steam vessel and a sailing vessel,—the former held liable for the damage, for not wearing in time. "*Osmanli*," 507.
5. Between two sailing vessels, the plea, in defence, of inevitable accident, not sustained. "*Benares*," 586.
6. Between vessels on different tacks. "*Lady Ann*," 364. "*IX. of Martz*," 371. "*Woodpark*," 397. "*Edward*," 401.
7. Where the damage exceeds the value of the ship, the gross freight, without deductions, is liable. "*Benares*," Supp. L.

See PRACTICE II., VI. 1, 5;—Costs.

COLONIES, marriages in,—see MARRIAGES, 1, 2.

CONTEMPT: a clerk in holy orders pronounced contumacious for disobedience to a sentence. *Bishop of Lincoln v. Day*, 1.

See CHURCH-RATE,—PRACTICE, VII. 2.

COSTS: Where the master of an American ship did not afford assistance to save the life of a seaman who had fallen overboard from another vessel with which he had come in collision, the Court, in dismissing the American owners, refused, on that ground, to decree their costs. "*St. Lawrence*," 556.

See PRACTICE, II., VI. 5.

DAMAGE—see COLLISION.

DEMURRAGE—See PRACTICE, IX.

DIVORCE—see ADULTERY.

DOCTRINES of the Church of England, function of the Ecclesiastical Courts and Judicial Committee of the Privy Council in reference thereto. *Gorham v. Bishop of Exeter*, 431.

EVIDENCE, effect of indirect, in suits for divorce by reason of adultery. *Calon v. Calon*, 30. *Faussett v. Faussett*, 95. Letters from an accused wife, effect of. *Calon v. Calon*, 15. *Faussett v. Faussett*, 88.

See PRACTICE, III.

EXECUTION of testamentary instruments :

1. *Irregular or defective, the instruments admitted to probate* :—Where signed below the attestation-clause, and across the paper, a blank intervening. *Re Beadle*, 49. Where the signature was placed immediately after the attestation-clause, written at the top of the second side of the paper. *Re Standley*, 70. Where the signature was in the attestation-clause (in a printed form), but immediately adjacent to the conclusion of the will. *Re McCallum*, 125. Where the testator, after duly executing his will, before the witnesses quitted his presence, made an addition thereto, which he signed, the witnesses adding their initials. *Re Christian*, 264. Cases in which the signature was held to be at the foot or end of the will. *Re Bat-*

ten, 288. *Re Whittle*, 290. *Re Dawson*, 439. *Re Practice*, 446. *Re Field*, 441. *Re White*, 543. *Re Hester*, 547. *Re Holland*, 549. *Re Cuppage*, 552. *Re Goldie*, 552 n. A rule laid down. *Re White*, 544.

2. *Irregular or defective, the instruments refused probate*:—Where an addition to a will, containing a specific bequest, and an appointment of executors, was below the deceased's signature, and interposed between the signatures of the two attesting witnesses. *Re Topham*, 372. Where the two subscribed witnesses deposed that the deceased did not sign in their presence, and that they did not subscribe in the presence of each other. *Beach v. Clarke*, 120. Where the two subscribed witnesses signed in the room where the deceased lay in bed, but deposed that the curtains of the bed were closed, and that she could not possibly have seen them sign. *Tribe v. Tribe*, 132. Where the name of the deceased was, at his request, affixed to the will by the drawer, who, in the presence and at the request of the deceased, asked two persons present to witness the paper, which they did, neither having seen the deceased's name written, and the deceased thereupon put a seal on the wafer and said, "I deliver this as my act and deed." *Re Summers*, 562. Cases in which the signature was held not to be at the foot or end of the will: *Re Hearn*, 268. *Re Odell*, 267. *Re Hill*, 269. *Re Weaver*, 270. *Holbeck v. Holbeck*, 294. *Re Minty*, 374. *Re Smith*, 376. *Re Beadon*, 376. *Re Shadwell*, 377. *Re Wood*, 435. *Re Rowe*, 545. *Re Curtis*, 546. *Re Wrighton*, 548. *Re Froggatt*, 550. *Re Howell*, 550. A rule laid down. *Re Rowe*, 546.

3. *Contradictory affidavits made by an attesting witness relative to the execution of a will*. *Re Hannam*, 437.

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2. *Nomination of executors according to the tenour, revoked by a codicil substituting others, under circumstances requiring the renunciation of a displaced executor*. *Re Treffry*, 382.
3. *Where a party named executor and trustee, on condition that he proved the will within three months, did not do so through the inadvertence of his solicitor, his appointment held to be void*. *Re Day*, 553.

FACULTY, for the removal of a chapel to another site, granted upon conditions. *Clayton v. Dean*, 46. The power of granting a Faculty for such purposes is inherent in the Ordinary. *Id.* 53.

FEME COVERTS—see PRACTICE, I. 3.—WILL, 9.

FREIGHT is not subject to bottomry when advanced *bond fide* anterior to the bond. "*John*," 64.

See BOTTOMRY, 1, 2.

INSTITUTION of clerks: the refusal by his diocesan to institute a clerk presented to a benefice, on the ground that such clerk had, upon examination, been found to maintain doctrines contrary to those of the Church of England,—sustained.—*Gorham v. Bishop of Exeter*, 157. Judgment reversed upon appeal. *Id.* 413. The proper mode of proceeding in such cases. *Id.* 193, 415. Whence the doctrine of the Church is to be deduced. *Id.* 422. Construction of the Articles and Formularies. *Id.* 213, 431. Function of the Ecclesiastical Court and Court of Appeal in such cases. *Id.* 431. Utterance and final proceedings in the case. Supp. lx., lxi., lxx., xci., and ciii.

INTEREST—see PRACTICE, IV.

INVENTORY AND ACCOUNT—see PRACTICE, V.

JURISDICTION :

1. Of the Judicial Committee of the Privy Council sustained in an appeal from the Archdeacon Court of Canterbury in a *duplex querela*, where a clerk presented to a benefice by the Crown was refused institution by his diocesan. *Gerham v. Bishop of Exeter*, Supp. lxi., lxx., and xci.
2. Of the Court of Admiralty sustained where a vessel, doing damage to another at Hull had proceeded to Scotland, and her owner being sued there, returned to England and was there arrested, the plaintiff abandoning the suit in Scotland, the defendant having, since the suit, sold the vessel. "*Bold Buccleugh*," 351.
3. Of the Prerogative Court of Canterbury sustained on ground of *bona notabilia*, where a testator, dying possessed of personal property in a single diocese, had, in his lifetime, taken bills, for goods sold, from purchasers then resident in that diocese (but who, at his death, had removed to other dioceses), which bills he had endorsed to his bankers, who discounted them, but they were dishonoured and remained unpaid. *Nicholl v. Thomas*, 407.

LETTERS, in suits for divorce by reason of adultery, effect of, as evidence—see EVIDENCE.

LIGHTS, directed by the Lords of the Admiralty to be used on board steam vessels, as guides to navigation, instructions respecting. "*Rob Roy*," 281. Rule with reference thereto. *Id.* 287.

— on board merchant ships, when to be shown. "*Osmanki*," 509. "*Benares*," 542.

LIS ALIM PENDENS, plea of, not sustained. "*Bold Buccleugh*," 348.

MARRIAGES :

1. A marriage between British subjects domiciled at Demerara, solemnized at St. Lucia, according to the rites of the Church of England, by a minister of that Church, without the formalities required by the general law of the island, under a license from the governor,—held to be valid. *Ward v. Dey*, 96.
2. A marriage between British-born subjects, natives of Europe, members of the Church of England, celebrated at Surat, by a minister not in Holy Orders,—held to be valid. *Maclean v. Cristall*, Supp. xvii.
3. The English marriage law does not follow the person. *Maclean v. Cristall*, Supp. xxix. That portion of the common law requiring the presence of an ordained minister at a marriage was never introduced into India. *Id.* xxx. How the marriage law of this country is affected by the law of other countries with reference to contracts not made in England. *Connolly v. Connolly*, 462.

MASTERS of ships—see BOTTOMRY—COLLISION—OWNERS.

NECESSARIES, demands against a foreign ship, under colour of, by a person alleging himself to be the agent of the ship, pronounced against as fictitious and fraudulent. "*Helena Sophia*," 492.

OWNERS OF VESSELS are responsible, civilly speaking, for the whole conduct of their masters, not simply in the navigation of the vessel, but in respect to offences of humanity. "*St. Lawrence*," 559.

See **BOTTOMRY—COLLISION.**

PAUPER dispaupered on a representation of facts by the Proctor assigned to him. *Leit v. Bailey*, 389. The mere fact of a party not being worth £5 is not sufficient, where circumstances show his ability to carry on the suit, to entitle him to the privilege of suing *in forma pauperis*. *Id.* 390.

PILOTS, responsibility of. "*Christiana*," 6. Though a pilot had brought the ship to anchor, yet being still on board, under certain circumstances, he was to be considered in charge of her. *Id.* 8.

PLEADING—see **PRACTICE**, VI.

PRACTICE.

I. Administration :

1. Where administration *de bonis non* had been granted to attorneys of the surviving executor, on his death (in Nova Scotia), the chain of representation not considered broken, and administration refused to one of the residuary legatees. *Re Bayard*, 117.
2. Where a limited administration of an intestate's effects had been granted to his solicitor, the next of kin (residing abroad) cited and not appearing, the application of the widow, eight years after, to revoke the grant, representing that she had been ignorant of her rights,—refused. *Lopes v. Hartley*, Supp. xxxi.
3. Where a *feme covert*, by will under a power, appointed a certain sum to trustees upon trust to pay the interest to her sons during the life of her husband, and at his death to divide the principal amongst her sons, naming no executor,—administration decreed to the husband, departing from the then existing practice to make such grants to the persons having the interest. *Re Dawson*, 317.
4. A residuary legatee, who had renounced administration *de bonis non*, allowed to retract, and to take administration in preference to a nominee of the creditors. *Dimes v. Cornwell*, 360.
5. Where administration is decreed to the widow, the grant will be in future limited during widowhood. *Re Teed*, 384.
6. Where a testator bequeathed the residue of his property in trust for his brother, a lunatic, which was left twice unadministered, on the death of the lunatic, administration *de bonis non* granted to a cousin germane of the testator. *Re Wood*, 442.
7. Administration of the effects of persons not domiciled in England. *Re Thomson*, 320. *Re Henderson*, 378. *Re Velsa*, Supp. xiviii.

II. Costs : Where, in a case of bottomry, on reference to the Registrar, the amount was reduced to one-fourth, the bondholder condemned in the costs of the reference. "*Gawdlet*," 41. And in a case of collision, where the claims were reduced to nearly one half, the plaintiffs were condemned in the costs of the reference. "*Shamrock*," 112.

III. Evidence :

1. In a testamentary suit, after the admission of pleas on both sides, and witnesses had been examined on one of them, before publication, appli-

injunction by a party in the cause to be dissolved, in order that his wife might be examined as a witness, — rejected. *Cullum v. Squibb*, 114.

2. In a cause of salvage, certain parties, alleged to be necessary witnesses, who refused to make affidavits, summoned by *subpoena* before the Court of Admiralty, and examined *vidæ voce*, under 3 & 4 Vict. c. 65. "*Gloria*," 262.

IV. *Interest*: A next of kin cannot, qua next of kin, oppose a testamentary paper without showing some interest; but a next of kin declaring that she opposed one of several papers, on the face of which paper she had no interest, was admitted to oppose on a suggestion that she had a possible interest arising from the execution of intermediate papers. *Baskcomb v. Harrison*, 275.

V. *Inventory and Account*: The attorney of the relict of a deceased, to whom administration had been granted on her behalf, on being cited by her to exhibit an Inventory and Account, was assigned to do so. *Bailey v. Bristowe*, 386. The plea of principal and agent is not available in such a case. *Id.* 387.

VI. *Pleading*:

1. Form of, in suits for divorce by reason of adultery. *Caton v. Caton*, 27. In suits of damage by collision, "*Lady Ann*," 370. In cases of refusal of institution by a diocesan to a presentee to a benefice, who obtains a monition from the Metropolitan Court. *Gorham v. Bishop of Exeter*, 193.

2. In a cause of salvage, after an Act had been given in by the promovers, they were, on application of the defendants, directed to alter the form of proceeding and bring in a Libel, defendants paying costs of the Act. "*Fence*," 66.

3. In a suit for divorce by reason of adultery by the wife, in *parvam*, plea of non-cohabitation held to be sufficient, without pleading non-consummation. *Hall v. Hall*, 56.

4. In a testamentary suit, after publication, the conclusion of the cause rescinded to allow one of the parties to plead a letter in the power of an adverse party. *Quail v. Manby*, 58.

5. In a cause of damage by collision, where the Report of the Magistrate has been confirmed, a question of costs may be heard on motion. "*Shamrock*," 113.

6. An Allegation of Faculties, in a matrimonial suit, where the husband (the party proceeded against) is in contempt, and the proceedings are in *parvam*, cannot be taken *pro confesso*, without witnesses. *Devereux v. Devereux*, 391.

7. A wife, sued by her husband for adultery, may refuse, in her Personal Answers, to answer articles pleading, not criminal matters, but circumstances leading up to the alleged adultery. *King v. King*, 396.

8. Rules as to the admission of averments, in a plea exceptive to the credit of witnesses, of matters known before publication. *Brown v. Brown*, 391.

VII. *Process*:

1. Where a ship had been arrested in a cause of salvage, the Court of Admiralty refused to supersede the Warrant on an allegation that the matter in dispute had been referred by mutual consent to arbitration.

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- "*Purissima Concepcion*," 150. Mere reference to arbitration is not sufficient to a Court's jurisdiction. *Id.* 151.
2. In matrimonial suit, by the wife against the husband, who had gone to West Indies, after a personal service upon him there, and no to arance, the Court pronounced him in contempt for the purpose of freeing. *Dasent v. Dasent*, 126.
- Probate in common form granted of a will of a testator who had executed a later will when of unsound mind. *Palmer v. Dent*, 555.
- A. Report of Registrar in Court of Admiralty, objections to, sustained. "*Alfred*," 352. Overruled. "*Clarence*," 579.
- X. Time given by the 95th Canon to a bishop to inquire into the sufficiency of a presentee to a benefice is not an absolute limitation, rendering an examination after that period null, the bishop being entitled to a reasonable time for the examination. *Gorham v. Bishop of Exeter*, 186.

PROBATE—see PRACTICE, VIII.

PROCTORS, in a diocesan Court,—decree admitting persons not qualified according to the practice of that Court, reversed on appeal. *Fell v. Bond*, 31.

——— admitted, 321, 586.

PROFESSION in religion, under the law of the Church of Rome, is no bar to a suit for restitution of conjugal rights in the Courts of this country. *Connolly v. Connolly*, 474.

PROHIBITION of the Ecclesiastical Court, motions for a Rule for, in *Re "Gorham v. Bishop of Exeter,"* in the Court of Queen's Bench, Supp. lxi; in the Court of Common Pleas, lxx; in the Court of Exchequer, xci.

PROTESTS of masters of ships, effect of, as evidence, in actions of damage by collision. "*Osmanki*," 509.

RESIDUE—see WILL, 2.

RESTITUTION of conjugal rights, not barred where the parties had both abjured the Protestant faith and embraced that of Rome, and the husband had, by the authority of the Pope, taken Holy Orders in that Church, and the wife, after a vow of chastity, had entered a convent. *Connolly v. Connolly*, 444.

SALVAGE:

1. After a derelict had been in possession of salvors for five days, and they allowed a Queen's ship to join in the remaining service,—held that such service rendered by the Queen's ship did not entitle Greenwich Hospital to claim under the Statute. "*Lady Kennaway*," 130.
2. Where a party, asserting himself to be a salvor, but who (as alleged) had been employed simply as agent, arrested the ship in a cause of salvage,—held that the action was maintainable. "*Purissima Concepcion*," 150. But his claim restricted to his disbursements, and an allowance upon a sum advanced. *Id.* 503.
3. Services rendered to a merchant-vessel by the East-India Company's marine,—held to be entitled to be remunerated upon salvage principles. "*Lord Dufferin*," Supp. xxiii. Considerations which apply to the scale of remuneration of such services. *Id.* xxiv.
4. An agreement or understanding between the owners of a vessel salvaged and the owner of a cutter engaged by them to perform the service,—no specific

sum being fixed,—held not to bar the master and crew of the cutter, not cognizant thereof. "*William Lushington*," 361.

5. Where salvors legally in possession of a ship were forcibly dispossessed by "wreckers," who removed part of the cargo, the original salvors held to be entitled to salvage upon the whole property. "*Fleece*," 534.
6. Where services were rendered by one steam-vessel to another, which had broken the intermediate shaft connecting the two engines,—the claim for salvage sustained. "*Nimrod*," 570.
7. Of a very meritorious character, rendered to a foreign ship in great peril. "*Hebe*," Supp. i.

STATUTES, construction of:

- 24 Hen. 8, c. 12—Supp. lxiii. *et seqq.*
- 25 Hen. 8, c. 19—Supp. lxiii. *et seqq.*
- 10 Geo. 4, c. 7—470.
- 2 & 3 Will. 4, c. 45—472.
- 3 & 4 Vict. c. 65—262.
- 9 & 10 Vict. c. 100—139.

TRINITY-MASTERS, in the Court of Admiralty, difference of opinion between. "*Immaganda Sara Clasinga*," 586. Their opinion not binding upon the Court. *Hammond v. Rogers*, Supp. xlvii.

VOWS OF CHASTITY, under sanction of the Church of Rome, no bar to a suit for restitution of conjugal rights. *Connelly v. Connelly*, 474.

WILL:

1. A testator having, in 1842, re-executed a will of 1837, in 1838 executed a further will virtually revoking the former, and subsequently executed a codicil declaring the last will void and that of 1842 valid,—held that the will of 1842 was revived. *Re Harper*, 44.
2. Where a testatrix bequeathed to certain parties "the remainder of her money," such parties held to be residuary legatees. *Re Hand*, 50.
3. Where, after the death of the testator, his will was found with the first sheet, containing the substance of the disposition, detached and missing,—the will was held to be revoked. *Williams v. Jones*, 106.
4. Two testamentary papers of 1836, neither containing a complete disposition, one informal, both enclosed in an envelope dated 1846,—pronounced for as together containing the will. *Foley v. Vernon*, 119.
5. A testator by his last will (in 1844) revoked all his former wills, "except his will bearing date 13th December, 1831, which relates exclusively to the reversion in fee of the T. estate,"—the only will relating "exclusively" to that estate being a will of 1839,—held that the will of 1831 was not revived. *Thomson v. Hempenstall*, 141.
6. Where a testator, *in extremis*, in giving instructions for his will, described a legatee by a wrong christened name, and, though the mistake was discovered, the alteration was not made, before execution,—the Court refused to alter the will. *Re Collins*, 278.
7. A testator, at the foot of a duly-executed will of 1833, made two unattested codicillary additions in 1833 and 1836, and five others in 1840, 1843, and 1844, and in 1847 duly executed a "codicil to his will,"—held that the five last additions were not thereby rendered valid. *Haynes v. Hill*, 256.

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8. A letter, written by a mariner in Margate Roads, unattested, containing dispositive words,—admitted as a mariner's will. *Re Miligan*, 271.
9. Where *une coverte*, having made her will under a power, married without settlement, then executed a paper annulling former wills, and without another paper confirming her first will,—held that the three subsequently contained the will. *Re Montagu*, 292.
10. A paper, in terms, apparently, but not intentionally, revoked,—admitted. *Lewis*, 436.

An order of a testator in India upon his agents in England, at 12 days' sight, to pay £4,000 to E. and Co., on account of M. L. J., a legatee named in his will, signed by the testator and attested by witnesses, proved as a codicil in India,—allowed to be propounded. *Jones v. Nicolay*, 564.

See ATTESTATION—EXECUTION—EXECUTOR—JURISDICTION—PRACTICE I., III. 1, IV., V., VI. 4, VIII.

END OF VOL. VII.

ERRATA.

- Vol. VI., p. 247, line 22, for "Act on Petition," read "Act of Parliament."
" note, for "s. 9," read "s. 7."
- Vol. VII., p. 15, line 9, for "charges," read "changes."
p. 44 (marg. note), line 18, for "first," read "last."
p. 45 (do.), line 3, for "1848," read "1842."
p. 68. The judgment in the case of the "Trial" was reversed by the Court of Delegates.
p. 176, line 20, before "*canonicè*," insert "*præsentetur*."
p. 187, line 19. Dr. Deane was also of Counsel for Mr. Gorham.
- Supp., p. i, line 23, *et seqq.*, for "Balli," read "Ralli."
p. xv, line *ult.*, note, for "Not rep.," read "12 Jur. 401."
p. xvi, line 25, for "Anderson," read "Anderson and Lee."

